No. 13392

United States
Court of Appeals
for the Ninth Circuit

WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Western District of Washington, Northern Division

Civil No. 3047

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEST SIDE FORD COMPANY, a corporation,

Defendant.

MOTION FOR ORDER REQUIRING RESPONDENT TO APPEAR, TESTIFY AND PRODUCE CERTAIN DOCUMENTS

To the Honorable Court:

The United States of America, Plaintiff herein, appeals to this Honorable Court pursuant to Section 705 (a) of the Defense Production Act of 1950 (Public Law 774, 81st Congress) as amended by Defense Production Act Amendments of 1951 (Public Law 96, 82nd Congress) for an Order requiring West Side Ford Company, a Washington corporation, respondent herein, to appear by and through its President, Robert E. Malone, and give testimony and produce certain documents described in the Subpena Duces Tecum annexed hereto and marked Exhibit A.

Plaintiff respectfully avers as follows:

1. At all times mentioned herein the West Side Ford Company has been engaged in the business of selling new and used automobiles at 3922 West Alaska Street, Seattle, Washington, within the ter-

ritorial jurisdiction of the Court, and subject to regulations issued pursuant to the foregoing Defense Production Act as amended.

2. Jurisdiction of this proceeding is conferred upon the Court by Section 705 (a) of the Defense Production Act of 1950 as amended.

3. Plaintiff is empowered under the provisions of Section 705 (a) of the said Defense Production Act to issue subpenas to obtain such information from and take the sworn testimony of any person as may be necessary or appropriate to the enforcement of the administration of the Defense Production Act.

4. On the 26th day of March 1952, as set forth more fully in the affidavits annexed hereto, John H. Binns, Seattle District Enforcement Director of the Office of Price Stabilization, pursuant to a delegation of authority emanating from the President of the United States, issued the Subpena Duces Tecum marked Exhibit A, which commanded Robert E. Malone, President of the said West Side Ford Company, to appear before him at the Seattle District Office of Price Stabilization, 905 Second Avenue Building, at 10:00 o'clock a.m., March 31, 1952, and give testimony and bring certain documents with him, which documents are required to be kept by regulations issued pursuant to the Defense Production Act of 1950 as amended.

5. The Subpena was duly served on the said Robert E. Malone on the 26th day of March, 1952, as more fully appears from the affidavit of service filed herein and made a part hereof.

6. The said Robert E. Malone intentionally failed and refused to obey the said subpena in that on the

31st day of March, 1952, the said Robert E. Malone did not appear at the time commanded in the subpena, or at any other time, as appears more fully from the affidavit of the District Enforcement Director which is annexed hereto and made a part hereof.

7. Wherefore, Plaintiff prays that an Order be issued directing the respondent to appear forthwith at the Seattle District Office of Price Stabilization and give testimony, and produce documents described in the Subpena Duces Tecum attached hereto.

Dated this 3rd day of April, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney

/s/ FREDERIC P. HOLBROOK,
Special Assistant United States Attorney

/s/ HOWARD F. FRYE,
Trial Attorney, Office of Price Stabilization.

PLAINTIFF'S EXHIBIT A

United States of America
Economic Stabilization Agency
Office of Price Stabilization

SUBPENA DUCES TECUM

To: Robert E. Malone, President, West Side Ford Co., Inc., 3922 West Alaska St., Seattle, Washington:

You Are Hereby Commanded to appear in the

Office of Price Stabilization, at Room 408, 950 Second Ave. Bldg., in the city of Seattle, State of Washington, on the 31st day of March, 1952, at 10:00 o'clock a.m., to give testimony concerning SR 5 to GCPR and CPR 83, under Defense Production Act of 1950, as amended.

And to bring with you and produce for inspection at said time and place, the following books, records and documents: Records and invoices relative to all sales of new automobiles sold from December 19, 1950 to present date, including records of service performed on said automobiles.

In Testimony Whereof, the undersigned, an officer designated by the Director of Price Stabilization, has hereunto set his hand this 25th day of March, 1952, at Seattle, Washington.

/s/ JOHN H. BINNS,
District Enforcement Director, Office of Price Stabilization, 905 Second Ave. Bldg., Seattle, Washington.

Note.—Section 705 (a) of the Defense Production Act of 1950, Public Law 774, 81st Congress, provides:

In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in this subsection, the District Court of the United States for any district in which such person is found or resides or transacts business, upon application by the President, shall have jurisdiction to issue an

order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of court may be punished by such court as a contempt thereof.

Under section 705 (c) of the Defense Production Act of 1950, you may, prior to the return date of this Subpena, furnish the Agency with a true copy of the above-identified books, records, and documents (certified by you under oath to be a true and correct copy), or you may enter into a stipulation with the Agency as to the information contained in the above-identified books, records, and documents.

Return of Service

State of Washington,
County of King—ss.

John P. Colman, being duly sworn, says that he is over 18 years of age and that on 26th day of March, 1952, at Seattle, Washington, he served this Subpena on the above-named individual by personally delivering a original to him.

/s/ JOHN P. COLMAN

Subscribed and sworn to before me, a Notary Public, this 26th day of March, 1952.

[Seal] /s/ WILLARD M. FARMAN

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

Harold F. Nelson, affiant being first duly sworn on oath, deposes and says:

1. That he is a Special Agent-Attorney employed as Chief of the Consumer Goods Enforcement Section, Seattle District Office of Price Stabilization.

2. That affiant on or about March 25, 1952, acting in his official capacity during the course of an investigation to determine compliance by West Side Ford Company with Supplemental Regulation 5 to the General Ceiling Price Regulation, issued March 2, 1951 (16 F.R. 1769 et seq.) and Ceiling Price Regulation 83 issued November 15, 1951 (16 F.R. 10595) requested William Bishop, Office Manager of the said company to permit a microfilming of sales records of new automobiles.

3. That the said William Bishop referred the question to the law firm of Bogle, Bogle, and Gates.

4. That R. W. Graham of the said law firm, acting on behalf of West Side Ford Company, refused to permit the request and in fact refused any inspection of the records whatsoever.

5. That a Subpena Duces Tecum was issued and served March 26, 1952, commanding William E. Malone, President of the West Side Ford Company, to appear at 10:00 a.m., March 31, 1952 and give testimony and bring with him certain documents.

6. That at 10:15 a.m., March 31, 1952 R. W. Graham of the said law firm telephoned affiant and

stated that, pursuant to his advice, Robert E. Malone would not appear.

7. That investigation had prior to the aforesaid request consisted only in spot checking base period sales and that a detailed audit of all sales is necessary in order that complete facts as to prices charged by West Side Ford Company be made available to the Office of Price Stabilization so that overcharges, if any, may be determined and in order that the duties imposed by law on the affiant may be carried out.

/s/ HAROLD F. NELSON

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington, residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Philip E. Hartwick, affiant being first duly sworn on oath, deposes and says:

1. That he is a Special Agent-Investigator employed by the Seattle District Office of Price Stabilization.

2. That on June 27 and June 28, 1951 at the specific written direction and authority of the District Enforcement Director, John H. Binns, affiant called at the place of business of the West Side Ford Company and checked the ceiling price list maintained by that corporation. Investigation was made by way of a spot check of base period sales for the period December 19, 1950 to January 26, 1951, inclusive.

3. That no detailed audit of sales either prior or subsequent to the base period was made or attempted.

/s/ PHILIP E. HARTWICK

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington, residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

John H. Binns, affiant being first duly sworn on oath, deposes and says:

1. That he is the District Enforcement Director of the Seattle Office of Price Stabilization.

2. That in the exercise of discretion delegated to him by and through a chain of authority emanating from the President of the United States, affiant deemed it necessary and appropriate to the enforcement of the Defense Production Act of 1950, as amended, to obtain information from and take the sworn testimony of Robert E. Malone, President of the West Side Ford Company, Incorporated.

3. That affiant, after having assured himself that no adequate and authoritative data was available from any Federal or other responsible agency, on the 26th day of March 1952, issued a subpena which commanded the said Robert E. Malone, President, West Side Ford Company, Inc., to appear in the Office of Price Stabilization, in Room 408, 905 Second Avenue Building, Seattle, Washington, on the 31st day of March, 1952, at 10:00 o'clock a.m., to give testimony and to produce certain documents.

4. That on March 31, 1952 the said Robert E. Malone intentionally failed to refused to obey the subpena in that he did not appear in the Office of Price Stabilization, Room 408, 905 Second Avenue Building, Seattle, Washington, at the time commanded in the subpena, or at any other time.

/s/ JOHN H. BINNS

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington, residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

John P. Colman, affiant being first duly sworn on oath, deposes and says:

1. That he is a Special Agent-Investigator employed by the Seattle District Office of Price Stabilization.

2. That affiant on March 11, 1952 and for a period of ten days thereafter, accompanied by Special Agent Edward F. Apstein, in his official capacity and at the specific direction and authority of the District Enforcement Director, John H. Binns, called at the West Side Ford Company.

3. That invoices for the base period—December 19, 1950 to January 26, 1951—were examined to determine the allowable maximum prices applicable to the said West Side Ford Company's business.

4. That further check made of invoices for a month subsequent to the base period indicated consistent and a continued practice by the subject, West Side Ford Company, of charging in excess of maximum ceiling prices.

5. That a further detailed audit of all sales made from March 1, 1951 to date is required in order to determine the amount by which sales made by the subject, West Side Ford Company, exceeded the allowable maximum ceiling prices.

6. That only invoices and records required to be kept by Price Stabilization Regulations were examined by the affiant.

/s/ JOHN P. COLMAN

Subscribed and Sworn to before me this 3rd day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington, residing at Seattle, County of King.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

OBJECTIONS AND ANSWER TO MOTION FOR ORDER REQUIRING RESPONDENT TO APPEAR, TESTIFY, AND PRODUCE CERTAIN DOCUMENTS

1. There has been a failure to define the scope and purpose of this investigation, as required by 50 App. U.S.C.A. 2155(a) and EP-2.

2. The District Enforcement Director has failed to comply with the terms of the delegation of authority to him to sign and issue subpenas.

3. There has been a failure by petition to show that the data sought herein are not available from any Federal or other responsible agency.

4. There has been a failure by petitioner to observe the pattern of enforcement envisioned by the statute and regulations.

5. There has been a failure to show the relevancy and materiality of the information sought to the purposes of the inquiry.

6. The subpena is too vague and unreasonable to be enforced.

7. The subpena, owing to its vagueness, lack of definition of scope and purpose, and unreasonableness, is contrary to the rights guaranteed to respondent by the Fourth Amendment.

8. The court should not lend its aid to undue and unreasonable harassment of respondent.

Dated this 10th day of April, 1952.

/s/ BOGLE, BOGLE & GATES
/s/ ROBT. W. GRAHAM,
/s/ J. KENNETH BRODY,
/s/ C. CALVERT KNUDSEN,
Attorneys for Respondent

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

William L. Bishop, being first duly sworn, on oath deposes and says as follows:

1. Affiant is now and has been at all times mentioned herein an employee of Westside Ford, Inc., respondent in the above-entitled action, in the capacity of Business Manager during the period December 19, 1950, to November 1, 1951, and in the capacity of Assistant General Manager thereafter.

In affiant's capacity as Business Manager and as Assistant General Manager affiant has become thoroughly familiar with the types and extent of the various records, invoices and other documents maintained by respondent relative to sales of new automobiles and service performed on said automobiles.

2. Those records consist of the following types of documents:

(a) Customer invoice. The customer invoice is furnished to each buyer of a new or used car or truck. Attached hereto as Exhibit A is a copy of the form used by respondent prior to the imposition of price controls. After the imposition of SR 5 to GCPR on March 1, 1951, respondent was forced to adopt a new form of invoice, at substantial cost to itself, to comply with the requirements of the regulation. A copy of the new form is attached hereto as Exhibit B. Customer invoices are numbered consecutively and filed according to number. During the period beginning December 19, 1950, and ending March 28, 1952, approximately 1,200 customer invoices were rendered by respondent covering all sales of new and used automobiles and trucks. Only approximately 365 new automobiles were sold by respondent during that period. In order to separate those customer invoices covering new automobiles from those covering used automobiles and new and used trucks each of the 1,200 invoices rendered must be separately examined. The invoices are not segregated in the files according to the type or age of the vehicle covered.

(b) Customer purchase order. Each time a new

or used truck or automobile is ordered by a purchaser, the purchaser executes a customer purchase order setting forth a description of the vehicle involved and the terms and conditions of the sale. A copy of the form used by respondent at all times mentioned herein is attached hereto as Exhibit C. These customer purchase orders are unnumbered and are filed in a folder bearing the name of the customer. The folders are filed alphabetically. In order to assemble those customer purchase orders pertaining to the sale of new automobiles during the period commencing December 19, 1950, and ending March 28, 1952, the customer invoices covering those sales must first be separated from customer invoices covering the sales of other vehicles. Then, by referring to the name on each customer invoice, the folder containing the purchase order can be extracted from the filing cabinet and the purchase order removed from the folder. Affiant estimates that approximately 365 folders must thus be located in order to obtain the customer purchase orders relative to new cars sold during the period mentioned.

(c) Purchaser's Statement. Each time a vehicle is sold on any extension of credit the purchaser fills out an application containing information as to his status as a credit risk. The form used by respondent at all times mentioned herein is attached hereto as Exhibit D. This application is unnumbered and is filed in the folder referred to above along with the customer purchase order and various miscellaneous documents. In order to obtain those applications relating to new car sales during the period

specified in the subpoena the same procedure must be followed as is described above with regard to customer purchase orders.

(d) Conditional Sale Contract. Respondent makes a substantial part of its sales under a conditional sale contract. Attached hereto as Exhibit E is the form of contract used by respondent at all times mentioned herein. After the sale the contract is filed in the folder referred to above with regard to customer purchase orders, and that same procedure must be used to obtain contracts involving new cars sold during the period from December 19, 1950, to March 28, 1952.

(e) Used car valuation. Each time a purchaser's used automobile is taken by respondent as a trade-in on a new automobile, the Sales Manager computes the value of the trade-in on the used car valuation form, a copy of which is attached hereto as Exhibit F. After that computation is made the net cash price to the customer can be ascertained. This form is unnumbered and is filed in the folder bearing the customer's name. Those used automobile valuation forms relating to new automobile sales during the December 19, 1950, to March 28, 1952, period can be obtained by using the procedure outlined above with reference to customer purchase orders.

(f) Inventory card. Respondent maintains a file of inventory cards covering all new vehicles bought and sold by it. A copy of the card form used by respondent at all times mentioned herein is attached as Exhibit G. That card reflects the status of the

vehicle with regard to accessories and carries certain other data. When a vehicle is sold that card is compared with the inventory tag on the vehicle to confirm the accessories charges and check the equipment attached. The cards are numbered with the house number of the vehicle covered and are filed in numerical order. Approximately 365 cards out of 415 pertain to new automobiles, and all 415 must be examined to separate those pertaining to new automobile sales from those pertaining to sales of other vehicles during the December 19, 1950, to March 28, 1952, period. These cards are not segregated in the file according to the type of vehicle covered.

(g) Inventory tags. Attached to each new automobile is an inventory tag, a copy of which is attached hereto as Exhibit H. This tag contains information concerning the description of the vehicle and the attached accessories. When the vehicle is sold, the tag is removed and placed in the same folder that holds the customer purchase order. In order to obtain the tags relating to the sales of new automobiles during the December 19, 1950, to March 28, 1950, period, the same procedure must be followed as is described above with regard to customer purchase orders.

(h) New and used car record. A record of each vehicle purchased or otherwise procured by respondent is maintained on its new and used car record, a copy of which is attached hereto as Exhibit I. This record shows the cost data with regard to each vehicle, and traces the subsequent sales of trade-ins so that the ultimate net profit on each new automobile

sale can be computed. The form is unnumbered and is filed according to date. To separate those forms pertaining to new automobile sales from those pertaining to sales of other vehicles during the December 19, 1950, to March 28, 1952, period will involve examination of approximately 600 forms to procure approximately 365. The forms are not segregated in the file according to type and age of vehicle.

(i) Repair Order. A repair order is executed by Service Department personnel each time work is performed upon a vehicle by a mechanic or other workman employed by respondent. Attached hereto as Exhibit J is a copy of the form used by respondent at all times mentioned herein. Repair orders are numbered consecutively and filed according to number. During the period commencing December 19, 1950, and ending March 28, 1952, approximately 13,000 repair orders were utilized and filed in the course of respondent's operations. Neither affiant nor any other person has any way of knowing how many of those 13,000 repair orders pertain to work done on new cars, but affiant estimates that between 300 and 500 so pertain. In order to separate those repair orders covering work done on new automobiles from those covering work done on other vehicles, each of the 13,000 repair orders utilized must be separately examined. The orders are not segregated in the files according to the type or age of the vehicle upon which the work is done.

(j) Hard copy of repair order. Each repair order has a light cardboard copy on the back of which the workman records the number of hours worked

on the automobile doing each job performed. These hard copies are numbered consecutively. Attached hereto as Exhibit K is a sample of the hard copy used by respondent. Hard copies that bear the name of the customer owning the automobile are filed alphabetically. Those that involve work not performed for a customer, as would be the case where work is done on a car not yet sold, are filed separately in numerical order. Here, also, a total of approximately 13,000 hard copies is involved in two different files. After the original repair orders pertaining to new automobiles are separated out, both files of hard copies must be leafed through to pick out the numbers corresponding to the original copies in order to separate the hard copies pertaining to work done on new cars from those pertaining to work done on other vehicles.

(k) Car Sales Journal. Each time a car is sold all the financial details of the transaction are entered into the Car Sales Journal. The information in that journal is posted to the General Ledger at the end of each month. Approximately 48 pages of the Car Sales Journal are covered by information relative to car sales during the December 19, 1950, to March 28, 1952, period.

/s/ WILLIAM L. BISHOP.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

William L. Bishop, being duly sworn, on oath deposes and says as follows:

1. Affiant is and at all times pertinent to the above-entitled action has been an employee of respondent Westside Ford, Inc., in the capacity of Business Maanger from December 19, 1950, to November 1, 1951, and in the capacity of Assistant General Manager thereafter. Both in his capacity as Business Manager and as Assistant General Manager affiant has become thoroughly familiar with the nature and extent of the various types of records and invoices maintained by respondent at all times mentioned herein. Both in his capacity of Business Manager and Assistant General Manager affiant was at all times mentioned herein exercising control and supervision over all clerical and office employees and was at almost all times during every business day present on respondent's premises and observing the conduct of business. In his said capacities affiant had occasion frequently to deal with representatives of the Seattle District Office of Price Stabilization who visited respondent's premises and made various inspections thereupon, and affiant had occasion to deal with other representatives of the Seattle District Office of Price Stabilization via the telephone.

2. On or about April 26, 1951, a Mr. Freeze, who stated that he was a representative of the OPS, called affiant on the telephone with regard to a complaint made to the OPS alleging over-ceiling charges by respondent for a new automobile. It was determined that the complaint was not well-founded, and Mr. Freeze informed affiant that he so stated to the complainant. In the course of the several telephone conversations affiant had with Mr. Freeze, the charge respondent was making for handling and delivery under SR 55 to GCPR was discussed. Affiant stated to Mr. Freeze what the charge was and how it was arrived at. Mr. Freeze assured affiant approximately as follows: "You are within the regulation on those items but I would not buy a car on that basis." At that time Mr. Freeze approved the charge respondent was making for certain optional equipment placed on the automobile at the factory, namely an oil bath air cleaner, oil filter and positive action wipers.

During June, 1951, a Mr. Hartwick, who stated he was a Special Agent of the OPS, visited respondent's office to inspect its price structure. Affiant gave Mr. Hartwick copies of respondent's December 19, 1950, to January 26, 1951, base period price schedule and the items included in respondent's handling and delivery charge. Mr. Hartwick inspected several invoices to determine whether respondent was charging the prices determined to be its ceiling prices. Mr. Hartwick stated that it appeared that respondent was in compliance with the applicable price regulation at that time.

On July 24, 1951, a Mr. Nelson, who stated he was an attorney for the OPS, visited respondent's office and discussed with Mr. Henry Benson, a CPA employed by respondent, and affiant the handling and delivery charge made by respondent. After some inconclusive discussion Mr. Nelson left, stating that he would investigate other dealers and inform affiant of any developments.

On March 11, 1952, Mr. John P. Colman and Mr. Edward F. Apstein, Special Agents of the OPS, visited respondent's office, presented their credentials, and asked to examine respondent's records relative to base period prices on new automobiles and new car prices since the base period. Respondent furnished them with an office in which to work and gave them free and complete access to any and all records and invoices requested by them concerning sales and service of new automobiles during the calendar years 1950, 1951 and 1952. For a period of ten (10) days these two Special Agents spent the major portion of each business day on respondent's premises checking its invoices and records of every kind relative to the December 19, 1950, to March 11, 1952, period. These Special Agents stated to affiant that they were gathering information concerning the handling and delivery charge to be sent to Washington, D. C. They further stated at one time that the information would be used as data upon which to base a revision of the regulations concerning that charge, and at another time that the information was requestioned for a Congressional hearing. After having complete access to all of respondent's rec-

ords and invoices for a period of ten (10) days, these Special Agents requested permission to remove from respondent's premises all of respondent's records which they desired for that fifteen month period and photostat them. Affiant referred this request to Messrs. Bogle, Bogle & Gates, respondent's attorneys. Affiant has had no further requests from or conversations with these Special Agents since that time.

3. At no time did affiant or any other employee of respondent refuse any agent or employee of the OPS access to respondent's premises and records.

4. At no time did the OPS ever serve upon respondent or any of its employees an Inspection Authorization.

5. Affiant has personally examined all of respondent's invoices for the month subsequent to the December 19, 1950, to January 26, 1951, base period and confirmed the fact that no sale or sales were made by respondent during that period at a price in excess of the maximum ceiling price prescribed by the General Ceiling Price Regulation.

6. Respondent, through its officers and agents, has at all times since January 26, 1951, prepared and preserved all records, rendered all reports and posted all notices required by GCPR, SR 5 to GCPR and CPR 83.

7. Respondent, through its officers and agents, has at all times exercised every effort to comply with and has in the honest belief of affiant complied

with both the letter and spirit of every lawful regulation issued by the OPS applicable to its business.

/s/ WILLIAM L. BISHOP.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

Ralph E. Malone, being duly sworn, on oath deposes and says as follows:

1. Affiant is and at all times pertinent to the above-entitled action has been the President and General Manager of respondent Westside Ford, Inc., a Washington corporation.

2. During the month following the December 19, 1950, to January 26, 1951, base period respondent made no sales of new automobiles at a price in excess of the maximum ceiling price established under the General Ceiling Price Regulation.

3. During the period commencing December 19, 1950, and ending January 26, 1951, respondent sold forty-seven (47) new automobiles.

/s/ RALPH E. MALONE.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

Robert W. Graham, being duly sworn, on oath deposes and says as follows:

1. Affiant is an attorney of Messrs. Bogle, Bogle & Gates, attorneys for respondent Westside Ford, Inc.

2. At no time did affiant deny any employee of the OPS access to the premises and records of respondent. Affiant did inform Harold F. Nelson, Special Agent-Attorney employed as Chief of the Consumer Goods Enforcement Section, Seattle District Office of Price Stabilization, that respondent had determined that it would not consent to the removal of any records or invoices from its premises for photostating by the OPS.

3. On March 31, 1952, the aforesaid Harold F. Nelson stated via telephone to affiant, several times and emphatically, with reference to the scope and purpose of the inquiry being made of respondent, that the OPS was concerned only with SR 5 to GCPR and not at all with CPR 83, and that the question of CPR 83 was still a high-level policy question upon which the Seattle District Office of Price Stabilization had as yet no instructions.

/s/ ROBERT W. GRAHAM.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

C. Calvert Knudsen, being duly sworn, on oath deposes and says as follows:

1. Affiant is an attorney associated with Messrs. Bogle, Bogle and Gates, attorneys for respondent Westside Ford, Inc.

2. On March 29, 1952, affiant did, in the offices of respondent Westside Ford, Inc., examine the cus-

tomer invoices for all new automobiles sold by respondent during the period beginning December 19, 1950, and ending January 26, 1951, and did determine, from those invoices, the delivered price charged by respondent during that period for new automobiles. Those invoices show that during that period respondent sold forty-seven (47) new automobiles. Affiant completed his examination in a period of time not exceeding two (2) hours.

/s/ C. CALVERT KNUDSEN.

Subscribed and sworn to before me this tenth day of April, 1952.

[Seal] /s/ J. KENNETH BRODY,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

John H. Binns, affiant, being first duly sworn on oath, deposes and says:

1. That he is the District Enforcement Director, Seattle Office of Price Stabilization, and that he makes this affidavit in support of the motion of the United States for an order to enforce an administrative subpoena.

2. That on March 3, 1952, affiant deemed it necessary and appropriate to the enforcement of price stabilization regulations governing sales of new automobiles that an investigation be made to determine the compliance by Westside Ford Company with Supplemental Regulation 5 to the General Ceiling Price Regulation and Ceiling Price Regulation 83.

3. That on March 3, 1952, affiant, acting in his official capacity, defined the purpose and scope of the investigation as follows:

"Westside Ford Co.
3922 West Alaska, Seattle, Washington.

By virtue of the authority vested in me as District Enforcement Director by Enforcement Procedure Regulation 4, the purpose and scope of this investigation, inspection, or inquiry are defined as follows:

1. The purpose of this investigation, inspection, or inquiry is to determine whether the above-named person has been and is complying with the Defense Production Act of 1950 and the following regulation(s) and/or order(s) issued thereunder

Para. 3 of SR 5 of G.C.P.R. and C.P.R. 83

2. This investigation, inspection, or inquiry may include any or all of the following as may be necessary or appropriate to effect the aforesaid purpose.

(a) Examining, copying and making notes of the books of account, statements, records, schedules, sales slips, papers, documents and any and all other writings of every kind, nature and description, required to be kept by the person named herein by the

Defense Production Act of 1950, and regulations or orders issued thereunder.

(b) Interviewing of such person or any other person or persons who may have, or are believed to have relative or pertinent information.

(c) Inspection of the premises and property of such person.

(d) Such other or further investigation, inspection, or inquiry as the District Enforcement Director may, in the exercise of his discretion, deem necessary or appropriate."

4. That the original official record of the foregoing definition is in my custody as District Enforcement Director.

5. That a copy of the official record is annexed hereto marked "Exhibit 1."; That affiant examined and compared the original with said copy and hereby certifies that the copy is true and correct in all particulars.

6. That the very nature of the data sought, namely, records, and invoices relative to all sales of new automobiles, assured the affiant that no such data were available from any Federal or other responsible agency.

/s/ JOHN H. BINNS.

Subscribed and sworn to before me this fourteenth day of April, 1952.

[Seal] /s/ N. N. VAUGHAN,
Notary Public in and for the State of Washington, residing at Seattle, County of King.

EXHIBIT "1"

OPS Form No. 228 (4-51)

Office of Price Stabilization
Office of Enforcement

Investigation, Inspection, or Inquiry

Purpose and Scope

District Office Case No.

This form must be filled out and made part of the file of the person under investigation, inspection or inquiry.

Person (See note below)—Westside Ford Co.

Address—3922 West Alaska, Seattle, Wn.

Purpose and scope of Investigation, Inspection, or Inquiry.

By virtue of the authority vested in me as District Enforcement Director by Enforcement Procedure Regulation 4, the purpose and scope of this investigation, inspection, or inquiry as defined as follows:

1. The purpose of this Investigation, Inspection, or Inquiry is to determine whether the above-named person has been and is complying with the Defense Production Act of 1950 and the following regulation(s) and or order(s) issued thereunder

Para. 3 of SR 5 of G. C. P. R. and C. P. R. 83.

2. This Investigation, Inspection, or Inquiry may include any or all of the following as may be necessary or appropriate to effect the aforesaid purpose.

[x] A—Examining, copying and making notes

of the books of account, statements, records, schedules, sales slips, paper, documents and any and all other writings of every kind, nature and description, required to be kept by the person named herein by the Defense Production Act of 1950, and regulations or orders issued thereunder.

[x] B—Interviewing of such person or any other person or persons who may have, or are believed to have relative or pertinent information.

[x] C—Inspection of the premises and property of such person.

[x] D—Such other or further investigation, inspection, or inquiry as the district enforcement director may, in the exercise of his discretion, deem necessary or appropriate.

Additional instructions and remarks—See attached file.

The District Enforcement Director is assured that the data herein sought are not available from any Federal or other responsible agency.

/s/ H. F. NELSON,
Consumer Goods.

OPS District Enforcement Director—(Signature)

/s/ JOHN H. BINNS.

Date: 3/10/52.

Note—Under Section 702(a) of the Defense Production Act of 1950, the word "person" includes an individual, corporation, partnership, association, or any other organized group of persons or legal successor or representative of the foregoing.

I attest and certify that the foregoing is a true and correct copy of the official record in my custody.

/s/ JOHN H. BINNS.

[Endorsed]: Filed April 14, 1952.

[Title of District Court and Cause]

AFFIDAVIT

State of Washington,
County of King—ss.

William L. Bishop, being first duly sworn, on oath deposes and says:

1. Affiant is and was at all times mentioned herein Assistant General Manager of Westside Ford, Inc., respondent in the above-entitled proceeding.

2. In the ten (10) day period from and after March 11, 1952, during which Mr. John P. Colman and Mr. Edward F. Apstein, Special Agents of the OPS, examined respondent's records as is more fully set forth in affiant's previous affidavit in this proceeding, affiant repeatedly asked said Special Agents what the purpose of their inquiry was. Said Special Agents stated to affiant that they did not know what the precise nature of the inquiry was, but that no specific complaint was being investigated and no violation was being investigated. Said Special Agents said that an "industry check" was being

made and that the information was "for Washington, D. C."

3. After that time, but before the subpoena concerned in this proceeding was served, Mr. Nelson, Special Agent-Attorney for the Seattle District Office of Price Stabilization, telephoned affiant and stated that no complaint or violation was being investigated, that an "industry check was being made" and in support of said statement further stated that a certain other automobile dealer was being checked at the same time.

4. No written or other determination of the scope and purpose of the inquiry being made was ever served upon or otherwise communicated to respondent or any of its officers and employees.

/s/ WILLIAM L. BISHOP.

Subscribed and sworn to before me this fourteenth day of April, 1952.

[Seal] /s/ C. CALVERT KNUDSEN,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed April 14, 1952.

In the District Court of the United States,
Western District of Washington,
Northern Division

Civil No. 3047

UNITED STATES OF AMERICA,
Petitioner,

vs.

WESTSIDE FORD COMPANY, a corporation,
Respondent.

ORDER ENFORCING ADMINISTRATIVE SUBPOENA

The above-entitled petitioner's motion for an Order requiring respondent to appear, give testimony, and produce certain documents described in the Subpoena Duces Tecum filed herein, marked Exhibit A, having come on for hearing in the above-entitled Court, setting without a jury, the Honorable John C. Bowen, United States District Judge, presiding, J. Charles Dennis, Frederic P. Holbrook, and Howard F. Frye, appearing for the petitioner, and Bogle, Bogle and Gates appearing for the respondent and moving papers and supporting affidavits having been introduced, and after argument said motion having been submitted for decision, and it appearing to the Court that pursuant to Section 705 (a) of the Defense Production Act of 1950, as amended, Ralph E. Malone, President, Westside Ford Company, Inc., on the twenty-sixth day of

March, 1952, was personally served with a lawful and duly executed Subpoena Duces Tecum to appear, give testimony, and produce certain documents before the District Enforcement Director of the Seattle Office of Price Stabilization, and that the said Ralph E. Malone, President of Westside Ford Company, Inc., intentionally failed and refused to appear with the said documents on the thirty-first day of March, 1952, as commanded by the said Subpoena Duces Tecum;

It is hereby ordered that Ralph E. Malone, President, Westside Ford Company, Inc., is directed and required to produce and permit the inspection and copying or photographing of the following designated new car records for the period December 19, 1950, to the present date which are in his possession, custody, or control: Customer invoices, car invoices, customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery, ceiling price lists effective after January 26, 1951, and any other records not specified above which contain the following information as to new cars sold:

(a) Date of sale.

(b) Make of automobile, model, year and body style, motor number and serial number.

(c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special, or optional equipment.

(d) State and local taxes.

(e) Charge for other services or items of equipment requested.

(f) Finance charges, name of finance company, method of payment and amount of cash received;

Provided that such inspection does not authorize microfilming of records and;

Provided further that the production of the said records or other documentary evidence shall be required at the premises of respondent at 3922 West Alaska Street, Seattle, during the reasonable business hours of respondent, commencing on April 23, 1952, and continuing until June 1, 1952.

Done in open Court this sixteenth day of April, 1952.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FREDERIC P. HOLBROOK,
Special Assistant U. S Atty.

/s/ HOWARD F. FRYE,
Trial Attorney.

[Endorsed]: Filed April 16, 1952.

[Title of District Court and Cause]

NOTICE OF APPEAL BY RESPONDENT WESTSIDE FORD, INC.

To J. Charles Dennis, United States District Attorney; Frederick P. Holbrook, Special Assistant United States Attorney; Howard P. Frye, Trial Attorney, Office of Price Stabilization:

Please take notice that Westside Ford, Inc., respondent in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of this Court entered herein on the sixteenth day of April, 1952, and from each and every part of the said Order.

Dated this sixteenth day of April, 1952.

/s/ BOGLE, BOGLE & GATES and
/s/ ROBERT W. GRAHAM,
Attorneys for Respondent
Westside Ford, Inc.

[Endorsed]: Filed April 16, 1952.

[Title of District Court and Cause.]

COST BOND ON APPEAL AND SUPERSEDEAS BOND

Know All Men by These Presents that the undersigned Westside Ford, Inc., a corporation, as principal and Anchor Casualty Company, a corporation organized under the laws of the State of Minnesota

and authorized to transact business as surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, petitioner in the above matter, in the penal sum of Four Thousand Dollars ($4,000.00), lawful money of the United States, for the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their heirs and personal representatives or successors, jointly and severally, firmly by these presents.

Signed, Sealed and Executed this twenty-first day of April, 1952.

Whereas the above-named respondent and principal has appealed to the United States Court of Appeals for the Ninth Circuit from the Order Enforcing Administrative Subpoena heretofore made and entered herein by the Hon. John C. Bowen on the sixteenth day of April, 1952, ordering and directing Ralph E. Malone, President of Respondent to produce and permit the inspection and copying or photographing of certain documents at Respondent's premises commencing April 23, 1952; and

Whereas, the respondent desires to effect stay of proceedings upon said order pending such appeal;

Now, therefore, if the terms of said order shall be satisfied and compiled with together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the order is affirmed; and if there shall be satisfied and complied with in full such modification of said order and such costs, interest, and damages as the appellate court may adjudge

and award, then this obligation to be void; otherwise to remain in full force and effect.

WESTSIDE FORD, INC.
a corporation,

/s/ By RALPH E. MALONE,
Its President.

ANCHOR CASUALTY COMPANY,
a corporation,

[Seal] /s/ By R. H. McDONALD,
Its Attorney-in-Fact.

The above cost and supersedeas bond is hereby approved.

Done in open Court this twenty-first day of April, 1952.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ ROBERT W. GRAHAM,
Attorney for Respondent.

Certified Copy of Power of Attorney attached.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that said papers constitute the record on appeal from that certain Order Enforcing Administrative Subpoena filed April 16, 1952, to the United States Court of Appeals for the Ninth Circuit, said papers being identified as follows:

1. Motion for Order Requiring Respondent to Appear, Testify, and Produce Certain Documents, filed April 3, 1952.

2. Reasons and Citations in Support of Motion, filed April 3, 1952.

3. Notice of Presentation of Motion, filed April 3, 1952.

4. Affidavit of Harold F. Nelson, filed April 3, 1952.

5. Affidavit of Philip E. Hartwick, filed April 3, 1952.

6. Affidavit of John H. Binns, filed April 3, 1952.

7. Affidavit of John P. Colman, filed April 3, 1952.

8. Marshal's Return of Service of Motion, Notice and Affidavits, filed April 8, 1952.

9. Objections and Answer to Motion for Order Requiring Respondent to Appear, Testify, and Produce Certain Documents, filed April 10, 1952.

10. Memorandum of Authorities in Support of Objections to Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and Produce Certain Documents, filed April 10, 1952.

11. Affidavit of William L. Bishop, with Exhibits A to K inclusive, attached, filed April 10, 1952.

12. Affidavit of William L. Bishop, filed April 10, 1952.

13. Affidavit of Ralph E. Malone, filed April 10, 1952.

14. Affidavit of Robert W. Graham, filed April 10, 1952.

15. Affidavit of C. Calvert Knudsen, filed April 10, 1952.

16. Affidavit of John H. Binns, filed April 14, 1952.

17. Appearance of Respondent, filed April 14, 1952 (by Bogle, Bogle & Gates).

18. Affidavit of William L. Bishop, filed April 14, 1952.

19. Order Enforcing Administrative Subpoena, filed April 16, 1952, and entered in Civil Docket April 17, 1952.

20. Notice of Appeal by Respondent, filed April 16, 1952, with copy of letter, Clerk to U. S. Attorney transmitting copy of Notice of Appeal attached.

21. Cost Bond on Appeal and Supersedeas Bond ($4,000.00), with Anchor Casualty Company as surety.

22. Praecipe of Respondent for certified copy of affidavit of William L. Bishop with annexed exhibits A to K inclusive.

23. Court Reporter's Transcript of Hearing on Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and produce Certain Documents, filed May 15, 1952.

24. Designation of Contents of Record on Appeal, filed May 20, 1952.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellant for preparation of the record on appeal herein, to-wit:

Notice of Appeal, $5.00, and that said amount has been paid to me by attorneys for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this twentieth day of May, 1952.

[Seal] MILLARD P. THOMAS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States for the Western District of Washington
Northern Division

No. 3047

UNITED STATES OF AMERICA,
Petitioner,

vs.

WESTSIDE FORD, INC., a corporation,
Respondent.

HEARING ON PETITIONER'S MOTION FOR AN ORDER REQUIRING RESPONDENT TO APPEAR, TESTIFY AND PRODUCE CERTAIN DOCUMENTS.

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington, April 14, 1952. [1*]

Appearances: J. Charles Dennis, United States Attorney, Frederic P. Holbrook, Special Assistant United States Attorney, and Howard F. Frye, Trial Attorney, Office of Price Stabilization, appeared for petitioner. Bogle, Bogle and Gates and Robert W. Graham appeared for respondent.

(Proceedings on April 7, 1952.)

The Court: The next case on the calendar is United States of America, Petitioner, vs. Westside Ford, Inc., a corporation, Respondent, No. 3047.

Mr. Frye: This is a motion——

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Who appears for the opposing litigant?

Mr. Graham: Bogle, Bogle and Gates and Robert W. Graham. I don't know what counsel would suggest, but I would like to make this request of the Court, your Honor. These various documents were served upon Westside Ford on Friday morning last. Since that time, there have been several of us in our office engaged in substantial work upon these matters.

I understand that the Enforcement Division does not object to a reasonable continuance of the hearing of the matter, and it was suggested to me by telephone conversation that perhaps two or three days would be in order. I feel in view of the very substantial issues which are here presented, [2] your Honor, there will be numerous problems which we will desire to submit a memorandum of authorities to the Court in response to a length memorandum which the Government has supplied, and we will also find it necessary to supply rather lengthy affidavits of fact in order that this matter may be considered.

The Court: Will it be convenient to do that next Monday?

Mr. Graham: I have this suggestion. I think counsel will undoubtedly agree that the matter would normally take, if all the issues were presented to the Court fully and adequately, perhaps 45 minutes to an hour each side.

The Court: I will not be able to give you that much time. There is not any day in the next month that I can do that. I will hear you on next Monday's calendar, at the end of the afternoon calendar.

Mr. Graham: It would be my suggestion that we set the matter on the afternoon calendar.

The Court: It will be placed on the calendar for next Monday afternoon, at the foot of the present calendar. There are two matters that could be lengthy on that calendar, I will do the best I can to accord counsel extra time, but you had better not expect as much time as you indicate.

Mr. Graham: We shall, in the light of that comment, be prepared to submit a rather full memorandum of authorities. [3]

The Court: Try to have all affidavits and memoranda on file by Thursday of this week, if you possibly can. This matter is continued one week from today, the fourteenth of April, at 2 o'clock in the afternoon, following the presently assigned calendar.

(Further proceedings on April 14, 1952.)

The Court: You may proceed in the Westside Ford matter, No. 3047.

Mr. Frye: As your Honor will recall, this is a motion to enforce an administrative subpoena which was issued pursuant to the Defense Production Act of 1950, Sec. 705 (a). I should like at this time to get that statute before the Court.

The Court: I would be glad to have that assistance.

Mr. Frye: I will mark the pertinent section.

The Court: Pages 20 and 21, with a certain paragraph, Sec. 705 (a), blocked off on the right?

Mr. Frye: Yes, your Honor. You will note that section provides that: "The President shall be entitled, while this Act is in effect and for a period

of two years thereafter, by regulation, subpoena, or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and [4] take the sworn testimony of, and administer oaths and affirmations to, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act and the regulations or orders issued thereunder."

Your Honor, the general ceiling price regulation, with supplemental regulation 5, and Ceiling Price Regulation 83 are the regulations which apply to the defendant's business. I submit these regulations to the Court only to cite the record-keeping requirements of the regulations. It is not our purpose to go into the substantive part of the regulations today, because they are not an issue.

Your Honor will note that General Ceiling Price Regulation, Sec. 16, which I have marked, requires that individuals subject to the regulation keep certain records available for examination by the Director of Price Stabilization, both base period records and current records. The same requirements are contained in the supplemental regulation 5 to this General Ceiling Price Regulation, and the same requirements are contained in Ceiling Price Regulation 83.

Only by examining those records is it possible for the District Enforcement Director to determine what price the defendant is charging for automobiles. The only evidence lies in his sales invoices for the base

period, December 19, 1950, to January 25, 1951, and following. That is all the [5] evidence that could be available to the Government.

To summarize the facts which are contained in the affidavits, the affidavit of John H. Binns, which was filed today in this action——

Mr. Graham: If the Court please, may I inquire is this affidavit properly before the Court.

The Court: What objection is there to it?

Mr. Graham: The matter was served at 11 o'clock. It tenders a substantial number of issues, which we would like to have the opportunity to respond to. It was served on counsel about 11 a.m. this morning.

Mr. Frye: If I may cite the local rules of the Court, if opposing affidavits are submitted two days prior to the hearing date, then the plaintiff or the one who makes the motion is entitled to submit rebuttal affidavits. It does not state at what time.

The Court: Let counsel point out the rule he speaks of and relate it to the facts or situation in this case. Cite the rule so counsel will know what you are talking about.

Mr. Frye: Rule 11, Hearing on Motions, states in part: "The moving party shall read (or, with the assent of the Court, may state) his notice of motion and moving papers. The opposing party shall thereupon read (or, with the assent of the Court, may state) the papers constituting his showing in opposition. The moving party shall not be entitled to [6] adduce any matter which is merely cumulative or corroborative of the papers served with the notice

of motion, except by special leave of court; but if the showing of the opposing party shall contain any new matter, the moving party shall be entilted to rebut such new matter, and for that purpose shall be entitled to a continuance of the hearing for a reasonable time, if he desire it."

This is particularly the part which I had reference to: "If, however, the opposing party shall have served on the moving party copies of the papers constituting the showing in opposition at least two days before the hearing, the moving party shall not be entitled to any continuance on account of the new matter, but in such case the moving party may read affidavits strictly in reply if served before the hearing begins,"—11 o'clock this morning, I take it, is prior to the time the hearing began—"and the hearing shall proceed unless the Court for special reasons otherwise orders."

The Court: Mr. Graham, does that apply?

Mr. Graham: If the Court please, the rule which counsel has read indicates that the Government may have opportunity to submit rebuttal matter, as counsel has quoted it. However, the matter which counsel for the Government submitted is not in rebuttal to any matter which we have submitted, and the material which now counsel seeks to put [7] before the Court is a condition precedent of his right to bring the action, not his right to initiate the request for enforcement order. There are a number of matters I would like to raise as to this affidavit, if this is the appropriate time. There are some substantial legal questions; principally, there has never

been any such scope and purpose determination served upon the respondent or upon any officer or employee thereof.

It is our contention that there are a number of legal issues raised with respect to the affidavit now tendered, your Honor, and it certainly is incumbent upon counsel for the Government to offer us the opportunity to so respond. Those matters are squarely at variance with the pleadings and the affidavits which were submitted in support of the Government's original papers.

The Court: Will you name the affiant? There is a great mass of material from Bogle, Bogle and Gates, but I see nothing so far from the opposing side.

Mr. Frye: There is not a great mass of material, your Honor, but there is an ample brief to support the Government's position.

The Court: When did you file it?

Mr. Frye: It was filed about three weeks ago, your Honor.

The Court: There is an affidavit of Colman, filed [8] April 3. There is an affidavit of Binns, filed April 3. Is that the one you are talking about?

Mr. Frye: The one we are talking about, I believe, is the one your Honor was just given by the clerk, which was filed today.

The Court: What have you to say in response to the argument just made by Mr. Graham about the character of the affidavit?

Mr. Frye: Counsel states it is not strictly in rebuttal of the affidavits which they have filed. We

take the position that there is a presumption that a public official acts legally and regularly. The bulk of the defendant's brief was an allegation, unsupported by any fact, that the District Director had acted illegally. That of course, puts the burden of going forward on the Government to rebut that allegation, which we have done by the affidavit filed this morning. I see no reason for not proceeding, as counsel knows full well every day we delay, and there has been some delay already, part of the Government's cause of action for damages is wiped out. There is only a year on this.

The Court: When was the action commenced?

Mr. Frye: The action was filed April 3rd, your Honor.

The Court: I think that the Court has given counsel [9] reasonable opportunity to present all the factual data that they wish, and I believe the rule fairly covers the situation and makes it appropriate for the Court to proceed. You may do so.

Mr. Frye: Just to summarize the affidavits, your Honor, the one that is in question now, I should like the Court, with the permission of counsel, to make a pen and ink change in the date set out there.

The Court: Let counsel have it and get it in order.

Mr. Graham: What is the request?

Mr. Frye: In paragraph 2 and paragraphs 3, I want to substitute March 10.

Mr. Graham: If the Court please, the affidavit, which was sworn to before a notary public of the State of Washington, recites that on March 3 cer-

tain actions were taken. The copy of the document which is attached very clearly and plainly states that there was a certain document executed on March 10. It is obvious from the affidavit. Counsel now wants to change the Director's affidavit and now make his statement at variance with what the Enforcement Director has sworn to, and I submit counsel or nobody else has the right to come to this Court and ask to change somebody else's affidavit.

Mr. Frye: The date was inserted due to clerical inadvertence. [10]

The Court: The Court does not feel it appropriate in this case to make the change over objection. Many times things like this are done, but it seems that counsel on both sides are contesting and resisting every step, and in view of the objection the Court will not approve of it. You may proceed.

Mr. Frye: I turn to the facts of Mr. John Binns' affidavit, in which counsel will not stipulate as to the date. The important thing, of course, is that the affidavit carries with it an exhibit which is certified to by Mr. Binns, who is the custodian of the official record, and that copy establishes definitely the action taken, namely, that the purpose and scope of the investigation was defined as required by Enforcement Procedure Regulation 2. If I may get that regulation before the Court——

The Court: Where is it?

Mr. Frye: I am handing it up now. The important thing to realize is Sec. 2, which requires that subpoenas shall be issued only after the scope and

purpose of the investigation, inspection or inquiry to be made have been defined.

The Court: Does this affidavit seek to define them, or purport to do so?

Mr. Frye: The exhibit to the affidavit defines the scope, your Honor. [11].

The Court: Where are the lines and figures and words that do so?

Mr. Frye: Down from the top of the page, the purpose and scope of investigation, and the small No. 1. "The purpose of this investigation, inspection, or inquiry is to determine whether the above-named person has been and is complying with the Defense Production Act of 1950 and the following regulations and/or orders issued thereunder." Then it specifies paragraph 3 of Supplemental Regulation 5 of the General Ceiling Price Regulation and CPR 83.

The scope is also defined in the small No. 2 underneath, which authorizes certain examination and interviewing, etc. That is the official record of the definition of scope and purpose which was made by the District Enforcement Director prior to the time any investigation was authorized, or certainly prior to the time any subpoena was issued in this action.

Pursuant to that definition of the scope and purpose, the affidavits will indicate that on March 11, and continuing for a period of some ten days, investigators at the place of business of the defendant examined certain records, consisting mainly of their sales records for the base period. According to the affidavit of Mr. John Colman, during the course of

examination, after the base period, he found numerous overcharges. [12]

Now, then, there is a direct conflict in the affidavits, whether or not those overcharges existed. Mr. Bishop and Mr. Malone of the defendants have denied that they ever made an overcharge, whereas the Government investigator has sworn that he found overcharges. In aiding the Court to resolve that conflict, I can only suggest that ever since that investigation was terminated, every effort has been made on the part of the defendant to suppress any evidence of overcharges and prevent any further examination of those sales invoices. The request was made to microfilm the records——

The Court: To microfilm?

Mr. Frye: To microfilm the records.

The Court: Who made that request, somebody on behalf of the Government?

Mr. Frye: Yes, your Honor. The affidavit of Mr. Harold Nelson will reveal that request, and that the defendant, acting by and through his counsel, Mr. Graham, refused permission to the Government to make that microfilming, and further refused any further inspection of the records whatsoever. There is also a direct conflict in the affidavits as to that fact.

The affidavit of Mr. Harold Nelson states that through counsel, the Government was refused any permission to examine the records further, even though those records [13] were required to be kept by the very regulations which applied to this defendant. However, the affidavit of Mr. Graham of

counsel denies that he ever refused such an inspection.

In aiding the Court to resolve that conflict, I can only suggest that if the Government had been permitted to examine those records, we would not be in court today trying to get a subpoena enforced. In fact, the Government would be willing now, as it has been in the past, to stipulate for an order that will allow the Government to go ahead and make an inspection of the records on the defendant's premises. However, the defendant is not willing now, nor has he been willing, to permit such inspection.

As I say, if the defendant is willing to permit inspection of the records, there is no use in going on with this hearing any further. However, he is not so willing, so we must continue. On the twenty-sixth day of March, a subpoena was issued, which is in the file marked Exhibit A, your Honor.

The Court: To which paper is it Exhibit A?

Mr. Frye: It is Exhibit A to the motion for order to enforce subpoena. It was filed on April 3 in the clerk's office.

The Court: Is it a form?

Mr. Frye: Yes, it is a form. It is an exhibit to the motion, and it is a form that is entitled United [14] States of America, Subpoena Duces Tecum. Your Honor will note that the president of the Westside Ford Company was commanded to appear in the Office of Price Stabilization, at Room 408, 905 Second Avenue Building, on the thirty-first day of March, 1952, at 10:00 o'clock a.m., to give testimony concerning SR 5 to GCPR and CPR 83, under

Defense Production Act of 1950 as amended, "And to bring with you and produce for inspection at said time and place, the following books, records and documents: Records and invoices relative to all sales of new automobiles sold from December 19, 1950, to present date, including records of service performed on said automobiles." It is signed John H. Binns, and the affidavit of service has been properly executed.

On March 31, the return date of that subpoena, the defendant, again acting through counsel, telephoned and stated that he would not comply with the subpoena. In brief, your Honor, every attempt the Government has made to get at this defendant's records, which are the only records that will indicate what he charged, whether or not he made overcharges, has been met by recalcitrant noncompliance on the part of the defendants.

The regulations which I introduced at the outset of the hearing provided that there were certain records that he had to keep for inspection by the Director of Price Stabilization. The defendant says, in effect, "I am above the law. [15] You cannot inspect those records." The statute says that the President has authority to issue subpoenas, and that the defendant is a person subject to the subpoena, but the defendant nevertheless says, "You cannot enforce the law as to me. I will not obey your subpoena."

I think surely the Court will not permit this sort of conduct to go any further, especially in view of the fact that, as I pointed out previously, every

day that elapses cuts off part of the Government's statutory action for damages. Every day of delay will mean that much difference.

The law which applies in a proceeding of this kind, I think, is clear. I should first like to dispose of the defendant's brief. It is some 27 pages long, but I think we can dispose of it rather quickly. He begins, of course, by alleging that the District Enforcement Director has acted illegally in that he did not define the scope and purpose of the investigation, and that he did not first assure himself that the data sought were not available to any other Government agency.

The affidavit of Mr. Binns, of course, and the official record to which it attests, indicates that any conditions precedent to the issuance of subpoena have been complied with, without a doubt. The defendant also says that there is a pattern of enforcement which the statute [16] requires that the Director has not complied with. He says, in effect, that first an inspection authorization should have been issued prior to the subpoena. Of course, the regulation requires no such thing, and admittedly the subpoena never would have been issued, in the first place, had the defendant been willing to comply with inspection authorization.

Then he goes on to show that the subpoena is too vague, and that it is unreasonable. It is interesting to note the affidavit of Mr. Knudsen, in which he sets out that he visited the defendant's place of business and in less than two hours was able to examine all the base period invoices of the de-

fendant and arrive at a proper ceiling. Less than two hours. I know Mr. Knudsen is a brilliant man. I went to law school with him. I am only sorry our investigators don't have the background of his ability.

However, the records indicate that our investigators were there for a period of about ten days, and the defendant now says that ten days was enough for us to examine records for a period of almost a year and a half. They say ten days is long enough to do that, but, on the other hand, they say five days is not enough time just to bundle the records up and bring them down, therefore, the request is unreasonable.

There is certainly nothing vague about the language of the subpoena. It specifies records and invoices relative to all sales of new automobiles sold from December 19, [17] 1950, to the present date, including records of service performed on said automobiles, sales invoices and records relative thereto. I can see nothing vague about that. If he had any question as to what that meant, he certainly didn't raise it, but merely decided he would not comply with it for any reason.

The last objection which the defendant raises is that the subpoena by reason of its various defects is contrary to the rights guaranteed to the respondent by the Fourth Amendment. Well, of course, there is no question of the Fourth Amendment in this case at all. The subpoena is not a search warrant. There is no question of probable cause. There is no suggestion that there was any illegal search or seizure going on.

There is some language in the Oklahoma Press Publishing Company case in which Mr. Justice Rutledge of the United States Supreme Court, in a wage and hour case, disposed of the Fourth Amendment very nicely. He said: "The short answer to the Fourth Amendment objection is that the records in these cases present no question of actual search and seizure * * * What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection * * *." [18]

I refer to the question of relevancy for a moment. Counsel for defendant has stated, being their whole argument on the fact, that there was no definition of scope and purpose, therefore, there could be no relevancy in any request that followed. The scope and purpose was defined. It wasn't required to be served on anybody, merely the definition of what was required. Having made that definition, the matter required in the subpoena is relevant on its face. It it not only relevant, but it is the only record, the only place where there is any evidence, which will allow the District Enforcement Director to determine the facts.

As to the objection that the Government is not entitled to microfilm the records, we have not alleged that we are entitled, although we do not concede it, but regarding this as no different than a motion to produce documents, if the evidence is accorded the Government there surely can be no objec-

tion to copying it or photographing it as is allowed by the Federal Rules of Civil Procedure, especially in view of the fact that the Defense Production Act requires that such information be kept confidential.

There is some suggestion that this requirement of bringing the books and records down to the Office of Price Stabilization is burdensome. I can only say that if it is burdensome, which I doubt, it is because the defendant was not willing to submit to inspection of the records on the [19] premises in the first place.

In short, your Honor, the only real question in this case is whether or not the Defense Production Act is going to be enforced. If this defendant can say to the Government, "You may not inspect my records even though the regulations require me to keep them for your inspection," if he can refuse to comply with a subpoena and get away with it, while all the time the statute of limitations is tolling, then, of course, so can everyone else do the same thing and it will simply be impossible to obtain any evidence as to the state of the business man's compliance.

If I may use the words of Justice Rutledge again, he said in that Oklahoma Press Publishing Company case: "The very purpose of the subpoena, as of the authorized investigation, is to discover and procure evidence and not to prove a pending charge or complaint. The statute leaves no room to doubt that Congress intended to authorize just what the Administrator did and sought to have the courts do. The Administrator's investigative function in

searching out the violations with a view to securing enforcement of the Act is essentially the same as the grand jury or the courts in issuing other pretrial orders for discovery of evidence and is governed by the same limitations. These are that he is not to act arbitrarily or in excess of his statutory authority."

There is certainly no question as to the statutory authority. There has been no arbitrary acting. We have merely insisted that this subject is not immune from the law, but is subject to it like everyone else, and if there is one principle I know this Court stands for, it is that everyone is equal and ought to be equal before the law.

The Court: I will hear the opposing argument.

Mr. Graham: If the Court please, with the permission of the Court, I should like to discuss what I believe are the issues here tendered, and if it be the will of the Court for further elaboration beyond one or two points I should like to discuss, I should like to ask leave to have Mr. Brody continue the argument with reference to the case authority, if that would be agreeable. I would like to outline briefly, if I might, the facts that are of record in the affidavits here before the Court. I don't know whether the Court has had the opportunity of examining——

The Court: You may proceed just the same as if I had, and if you think there is something that should be called specifically to the Court's attention, you have sufficient time to do that.

Mr. Graham: I would like to call the Court's attention first to the fact that the affidavits disclose

that on two separate occasions last April and June, the respondent company was visited by representatives of the Office of [21] Price Stabilization, namely, Mr. Freeze and Mr. Hartwick, and the affidavit discloses that on examination of the pricing methods and practices of respondent, the company was advised on both those occasions that those pricing practices and activities were in conformance with the applicable regulations of the Director of Price Stabilization.

Now counsel has indicated that the respondent has refused to permit inspection of the records. The record here before the Court, your Honor, categorically denies that. Counsel's own statement does, and Mr. Colman and Mr. Apstein of the applicant's office staff called at the offices of Westside Ford and for a period of ten days those two gentlemen had complete access to every document and record that the Westside Ford possesses. There is no dispute as to that fact in the record.

It is stated in the affidavit of Mr. Colman that during that period of time, twenty man days, that they proceeded to make an inspection of the base period records and one month thereafter, and during that period of the base period and one month thereafter, the Westside Ford Company sold 57 new automobiles. I appreciate the kind comments made as to Mr. Knudsen's ability and aptitude, but the plain fact of record is that the work entailed in an examination of the base period records and that month thereafter consumed approximately two hours of Mr. Knudsen's time. Counsel calls [22] my

attention to the fact that there were 47 rather than 57 new automobiles sold during that period.

Now, I do not know what the two gentlemen did at the Westside Ford Company for that ten day period commencing on or about March 11, but I think the record is uncontroverted that the Westside Ford Company did everything that the statute calls upon it to do. They gave them complete access to all the records and files. They furnished a room for the two gentlemen to work in, and they were available to answer questions. Opportunity to examine the records required by the Act, and, as a matter of fact, opportunity to examine records far beyond those called for by the Act were the petitioner's for the asking.

The record also indicates, your Honor, that during the course of these various conversations with representatives of petitioner, there have been a lot of conflicting and controverting statements as to the nature or purpose or scope of the inquiry. The affidavits indicate that the respondent's representatives on different occasions have been advised that this information was sought to obtain a revision or clarification of the regulations. Also, they have been advised that this information was for the purpose of a Congressional hearing, and they were also advised that the information was needed for an industry check.

Finally, after this period of ten days, but when [23] every document and record in the office of the Westside Ford Company had been made available to the petitioner, the request was made for the oppor-

tunity to remove from the premises all the books, documents and records that the representatives desired to take some place for photostating, and at that time, frankly, the respondent felt that had been enough. It was following this subpoena.

I am not going to burden the Court with a recitation of the facts that before the Office of Price Stabilization there have been filed by this respondent and by some 100 to 150 other automobile dealers in the State of Washington requests for clarification and declarations as to the validity of certain of these regulations. That probably is not material to this inquiry, but I would like to call the Court's attention to a very basic problem that the petitioner is now confronted with, and for the purpose of reference I would like to call the Court's attention to Sec. 705 (a) of the Act, a copy of which has been furnished and referred to at page 1 of the respondent's memorandum.

The statute provides that the Director of Price Stabilization, or the President, acting through him, or such other person as he may designate, is authorized to require the keeping of information and books and records, etc., and to issue subpoenas, etc., and then there is this statement in the statute, your Honor, and I call the Court's attention [24] to the fact that this phrase in the statute finds no counterpart in the Emergency Price Control Act of 1942, and that phrase is this: "The President shall issue regulations insuring that the authority of this subsection will be utilized only after the scope and purpose of the investigation, inspection or inquiry to

be made have been defined by competent authority * * *."

Now, that objection was presented in the objection to the petition on behalf of the respondent, and a memorandum of authority outlining the position of respondent was submitted. To indicate to your Honor, counsel for the petitioner has proceeded in his original motion or application upon the premise that the 1942 Act and the present Act are synonymous. I call the Court's attention to paragraph 7 of the petitioner's memorandum of authorities in support of his motion wherein he states with reference to these various cases decided under the 1942 Act: "The applicability of these cases is further emphasized, with respect to the Defense Production Act of 1950, as amended, by the traditional rule that re-enactment of a statutory provision identical in policy and scope, creates a presumption of legislative adoption of previous judicial construction."

When this petition was filed, counsel proceeded upon the premise that there was no need for a definition of scope and purpose of the subpoena or any other administrative [25] action, and now recognizing that he has been in error, an attempt to correct that is now made at the eleventh hour by service upon the respondent of an affidavit and an attached document. I would like to call the Court's attention—and I am not waiving the objection originally made to the consideration of this affidavit. The rule of court, local rule 11, provides that if the showing by the opposing party shall contain any new matter, the moving party will be entitled to

rebut. We came forward with no affidavits that entitle the petitioner to come forward with rebuttal, and I would like to make the objection for the record that the affidavit and the supporting documents be now admitted for consideration at this time. If that deemed to be overruled, as I understand the Court's ruling to be, I should like to present to the Court a supplemental affidavit of Mr. Bishop, serving a copy upon counsel.

The Court: You may have leave to serve and file that further affidavit of Mr. Bishop.

Mr. Graham: And that is without prejudice to the contention that the affidavit of Mr. Binns, served as of 11 a.m. today, is not properly before the Court at this time.

The Court: The Court permits you to preserve that objection.

Mr. Graham: The Court will note from the affidavit of Mr. Bishop that no copy of this document has ever been [26] served upon respondent or upon any of its agents, representatives or employees. I call the Court's attention, as did counsel, to the inconsistency in the affidavit of Mr. Binns as to the dates. I do not know what date Mr. Binns made the determination purported to be attached as Exhibit 1. I do not know what Mr. Binns did or whether it was executed on the third or entered on the tenth, twelfth or fourteenth, and frankly, I would like to know, your Honor.

You will note that the exhibit attached to Mr. Binns' affidavit recites in it, "See the attached file." Well, it seems to be incumbent upon the petitioner,

if he urges before this Court that a determination has been made in accordance with the statutory requirements, that we have an opportunity to find out what that determination was, and I submit to the Court that the exhibit is not a complete recital or record of the determination, and that as a condition we are entitled to examine Mr. Binns as to what was done and what action was taken and upon what premise he did act.

I would like to call the Court's attention to the proposition that this document and its attempted utilization here presents a very fundamental legal issue. The Emergency Price Control Act of 1942 did not require any such determination, your Honor, and Congress for good cause, apparently recognizing in the decisions under the Emergency Price Control [27] Act that for reasons of sound policy it should be required, required a determination of scope and purpose of whatever administrative action the Administrator sought to take, and I submit to the Court that such a question is not resolved by some gobbledegook in some administrative files and records.

If that statutory provision means anything, it means that the respondent is entitled to be advised at the time the request is made upon him as to what the scope and purpose of the information requested may be, and I think, as I have recited the facts behind this, that is a very pertinent question. It may determine what the respondent's actions will or will not be in response to this request, and I submit that

we, in view of the presentation at this time of a document which purports to be a resolving of the scope and purpose of the administrative action, that we have the opportunity to present to the Court whatever opposing factual information we may desire to present, and further, as a condition of that consideration of this document, we have the opportunity to inquire of Mr. Binns as to the documents or the premises upon which he did act, and further the opportunity of presenting to the Court the bases for my contention, which are simply these, that we are entitled to know before any request is made as to what the scope and purpose may be.

Now, that isn't so much discussion, your Honor, [28] and is perfectly plain from a reading of the affidavits before this Court that the determination of the scope and purpose of this inquiry is exceeding the material. An analysis of the regulations reveals that during three separate periods of time, there were three different price ceiling regulations in effect. For a period of time, the General Ceiling Price Regulation was in effect. It was in effect for the period of more than one month following the freeze date, and recalling the affidavit of Mr. Colman and the fact that he examined the books and records for one month following the freeze date, he was concerned and his allegations of fact about violation relate to a period when the General Ceiling Price Regulation was applicable, and the affidavits of Mr. Bishop and Mr. Malone are categorically that during this freeze date period under GCPR all sales were made in conformance thereto.

We are not going into the merits of whether or not violations have taken place at this stage of the proceedings. There was a second period covered, as the regulations reflect, there was a period in effect from March 1 through October 15 and the various dates subsequent thereto based upon the applicable Special Order issued under CPR 83, a period under GCPR Supplemental Regulation 5, when a different set of regulations was in effect. I call the Court's attention to my personal affidavit, reflecting a [29] telephone conversation with a Mr. Nelson of petitioner's staff, wherein it was stated categorically that the only inquiry related to Supplemental Regulation 5, there was no inquiry as to CPR 83. I do not know what the scope and purpose—maybe Mr. Nelson was in error. Maybe the subpoena inquires of different periods.

I call the Court's attention to the fact that not only do the substantive provisions of these regulations differ, but the requirement for record keeping thereunder and the pertinent material records thereunder are different. It seems to me, your Honor, that we certainly, being confronted at this time with the contention, that we now have a document which pulls the rug, so to speak, from a very basic issue which was raised in our memorandum here, that we have an opportunity first to determine what the Director did or purported to do under that statutory requirement.

We would like to see the attached file of the Director as to what he did and why he acted, and also I would like the opportunity to submit such

authorities as there may be—and obviously, since 11 o'clock this morning I have not had the opportunity of doing so—such authorities as there may be to support the contention that the scope and purpose determination must be made in advance of the administrative action and it must be served upon and communicated to the respondent in order that the statutory [30] provision may be required. This may be a kind of first impression, I have not had the opportunity of examining the authorities, but it certainly is in order to place ourselves in the position of advising the Court as to the proper authorities upon that proposition.

Now, as I see it, Your Honor, that question as to the requirements of the statute that a determination be made of the scope and purpose of the inquiry is fundamental, and if my contention on that proposition is correct, there is no need for us at this time to consider the additional questions as to the breadth, scope, etc., of the subpoena. If the Court desires to have comments with reference to those other issues which Mr. Frye has presented in the course of argument to the Court, I should like to have leave of the Court to ask Mr. Brody to present those matters for the Court's consideration. It does seem to me, however, that the basic problem here is whether or not the Administrator has complied with the statute, and I submit on this record he has not.

The Court: I will hear from Mr. Brody.

Mr. Brody: Your Honor, aside from the question of statutory compliance, we have cited a great

many cases in our brief to this point, that there is always a question before the Court when an application is made for an enforcement order on an administrative subpoena, there is always a [31] question of the relevancy and the materiality of the data sought. I believe that in petitioner's brief in support of his motion he made the statement, which we believe to be erroneous, that that finding of relevancy was solely in the hands of the Administrator or the administrative official who makes the determination to issue the subpoena, but we believe that the authority clearly points out that this is not so and that it is for your Honor to determine whether or not the material sought is relevant and material to the purpose of the inquiry. That is why, your Honor, it is so vital to make a proper determination of the purpose of the inquiry, and we have pointed out by reference to the affidavits submitted by petitioner that there seems to be considerable doubt as to the scope and purpose of this inquiry.

The affidavit of Colman refers to violations in the month following the base period. The subpoena itself asks for information concerning SR 5 and CPR 83, both of which went into effect much later than the base period. The affidavit of Mr. Graham states that the statement was made to him that this investigation was to be limited to SR 5. All of this goes to show, your Honor, the confusion which does exist as to the purpose of this inquiry.

Now, we have the affidavit of Mr. Bishop of the respondent, and his affidavit shows the tremendous

scope of the records that Westside Ford Company keeps. They keep [32] records of financing. They keep certain types of inventory records which show the various pieces of equipment that go onto each car. They keep a large number of records which perhaps have very little relevance to the pricing arrangements for the sale of the car. They keep thousands of repair orders, each repair order being written up separately and the petitioner has asked for the repair orders relating to the sales of new cars.

Now, some of this information may be relevant to the inquiry, providing that the purpose of the inquiry has been defined. Some of it may not. We certainly argue to this Court that a mere statement that they want all records is certainly not a statement which should receive the assent of this Court, and that all records should not be required to be produced until it has been shown what records are relevant to the purposes of the inquiry and why.

We have further argued that the Fourth Amendment may be an issue in this case, and Mr. Frye has cited to the Court the Oklahoma Press Publishing Company vs. Walling case. We certainly agree, your Honor, that in a case where the purpose of the subpoena is reasonably defined, where the information sought is bound to be relevant to the purpose of the subpoena and there is no illegal search, there is no unreasonable request, an order of enforcement should be issued. It is our contention that there has been no [33] adequate defini-

tion of purpose, that we do not know and this Court cannot tell from the record before it whether or not the material sought is relevant to the purposes of the inquiry.

The breadth of the subpoena appears to be unlimited, and in case of an unreasonable subpoena, and further, a subpoena which we contend is without the authority of law because it has not complied with the statutory requirements, then we have the issue of an illegal search and seizure under the Fourth Amendment. We do not argue independently that any administrative subpoena constitutes such a violation of the Fourth Amendment, but an administrative subpoena which is issued under these circumstances.

Finally, I should like to say, your Honor, that we have raised a point which every court which has had to consider the question of enforcement of these subpoenas has been sensitive to, and that is the question of whether the petitioner by his actions has shown himself worthy of the aid of the court in the enforcement of the subpoena. The court sits in an equitable capacity to determine whether it should lend its weight and its authority to the enforcement of the subpoena. We have shown your Honor the cooperation which respondent had at all times offered to the Office of Price Stabilization before the final request was made. We have shown the presence of their agents Freeze and Hartwick [34] upon the premises of respondent and the ten day period of examination, the fact that respondent furnished an office and made all of its records

available. All of this, your Honor, should emphasize the nature and extent of the requests that have been made upon the respondent.

We emphasize the affidavit of Colman and his statements of repeated violations, not because we seek at this hearing to have a finding made as to whether or not there were violations of the General Ceiling Price Regulation, we have submitted that to show the attitude which petitioner has taken toward respondent and the amount of harassment which respondent has undergone, an amount which is demonstrated by an allegation of violations concerning a period about which information apparently is not even sought in the fundamental subpoena.

It is interesting to note in a case in the Oregon courts in which an enforcement order was sought, where there had been three previous examinations, the Court denied the application for an enforcement order and it stated that "We should be very careful, when there have been repeated previous investigations, in exercising our equitable powers in aid of the enforcement order."

All of these considerations, and especially the fact that at 11 o'clock today an affidavit was filed purporting to go to the main issue of whether or not the statute [35] has been complied with, show the amount of notice, the amount of consideration which has been given to respondent by petitioner, and we therefore urge that, in addition to the chief point made by Mr. Graham of noncompliance with the statute, that there has been no showing of

relevance and materiality of the information sought, no definition of the scope of the information sought, that the subpoena is vague and unreasonable in failing to state it more accurately and failing to determine why it should be made available; that under all these circumstances, there may be a violation of the Fourth Amendment, and that under all the circumstances which we have considered, petitioner has not shown itself to be worthy of an order of enforcement from this Court.

Mr. Graham: If the Court please, in conclusion——

The Court: I did not know there were going to be so many arguments.

Mr. Graham: I would like to make a request, your Honor. I would like to make the request that we have an opportunity to respond to the affidavit of Mr. Binns within a reasonable period of time and with such memorandum of authority as may be——

The Court: The Court has to rule on this today. I think that a showing on behalf of the motion has reasonably been made, and the motion is granted, with this exception, that the production for copying and photographing may be [36] made at the plant of the respondent corporation and there will be no order of the Court at this time for the production at the offices of the enforcement officer who is acting for and on behalf of the United States of America, and there will be no liberty of microfilming of any documents or series of documents or total of records. It can only be done by photographing process, not microfilming, and the Court will reserve for

later developments to see whether or not I think it is a proper case for microfilming of the entire record.

Mr. Frye: Is the process of photostating proper, as distinguished from photographing?

The Court: If you have a photostating machine which you can take there and take some of these documents. I do not consent to your starting in with the first paper and photostating the entire corporate records. It is those papers thought to have material parts which are authorized, just the same as if you had a camera to photograph some paper you thought was material, but so far as starting with the first paper and going through the last, that is not approved.

The question is the time and place of production. I have said it shall be at the place of business of respondent. Are there so many rooms at that place of business that there might be some dispute as to which room would be a proper place? Is there any need for further clarification?

Mr. Frye: I don't see why there should be, as [37] long as there is an adequate place to do that work.

The Court: What kind of photostating machine have you?

Mr. Frye: What I was considering is the microfilming machine, which can do the whole job.

The Court: The Court does not approve that.

Mr. Frye: As such, we have no photostating machine. That will be another agency.

The Court: If you furnish copies that indicate

that it is material and relevant to have a photostat or a microfilm of the entire record, I will have to hear that in the future. I do not forclose your bringing that to the Court's attention in the future, but for the present, where you are seeking information, the Court does not approve of your microfilming the entire records of the company and taking it away from the plant, any more than the Court approves of taking all of the records of the company away from the plant and bringing them to the office of the Enforcement Director. I do not approve of that, but any record of the company is subject to this motion if the looking at it is in connection with Supplemental Regulation 5, and particularly Section 3 thereof, to the General Ceiling Price Regulation and Ceiling Price Regulation 83 under the Defense Production Act of 1950 as amended.

Mr. Graham: May I inquire, your Honor, do I [38] understand the Court's ruling to limit the Court's order to those documents which are required to be kept under the regulations issued pursuant to the Defense Production Act?

The Court: Is there any reason why that should not be?

Mr. Frye: No objection to that, your Honor. The records are amply specified in the regulation.

The Court: That is the intention of the Court. I would like it to be understood that Mr. Frye has said that the only machine he had for photostating was the microfilming machine, and I have directed, as the Trial Judge, that that machine be not used in this instance.

I would like the record to show expressly that the Court in this connection has overruled the objections of the respondent, except insofar as there is any implied sustaining of them in the specifications which the Court has made in connection with the ruling.

(Further proceedings on April 16, 1952.)

The Court: Do counsel for petitioner have anything to say?

Mr. Frye: Your Honor, this was set as an agreed order, but it has not yet been possible to reach any agreement. If I understood your Honor correctly last Monday, if there wasn't an agreed order you would hear it at 4:30 this [39] afternoon.

The Court: We will proceed to hear it now. Does opposing counsel have a proposed form of order?

Mr. Frye: You have one from each of us, your Honor.

Mr. Graham: If the Court please, I have an order which I beleive conforms to what the Court ordered. I do not desire to be placed in the position of presenting an order in this matter. I obviously desire to reserve all appropriate objections and exceptions, but there is an order.

The Court: Let the record show the statement of attitude of counsel for respondent. Mr. Frye, what do you understand to be the points of divergence between counsel so far as the form of the suggested order is concerned?

Mr. Frye: Counsel telephoned me yesterday and asked that I make our order as specific as possible. Therefore, I have enumerated each and every document which we desire to inspect.

The Court: That is on page 2 of the order form?

Mr. Frye: Yes, your Honor. It details it so that there will be no misunderstanding as to which record the Government is entitled to look at. I tried to avoid any future controversy when I wrote this order.

The Court: Among other things, on page 2 it is stated that Ralph Malone, President of the respondent company, is directed and required to produce and permit the inspection [40] and copying or photographing—I thought as to photostating that you advised the Court that the only machine you had available which might be classed as a photostating machine was the microfilming machine.

Mr. Frye: Yes, your Honor.

The Court: I think you should strike that, because someone might interpret that as including the microfilming machine, and I do not so interpret it.

Mr. Frye: Below that there is a proviso which prohibits microfilming, as your Honor directed Monday.

The Court: Until I find out what the photostating machine is, I thing I will strike this out. Then those materials which may be so inspected and copied or photographed are "customer invoices, car invoices, customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery, ceiling price lists effective after January 26, 1951, and any other records not specified above which contain the

following information as to new cars sold: (a) Date of sale; (b) Make of automobile, model, year and body style, motor number and serial number; (c) Basic price, transportation charge, preparation and conditioning, Federal excise tax, charge for extra, special or optional equipment; (d) State and local taxes; (e) Charge for other services or items of equipment [41] requested (undercoating, glazing)." Do you intend that those words in that parenthesis shall restrict the meaning of the more general terms "item of equipment requested"?

Mr. Frye: No, your Honor, that is just by was of example.

The Court: I am afraid that item would cause dispute as to meaning.

Mr. Frye: If we struck it out entirely, there would be no dispute then, perhaps, your Honor.

The Court: I wish counsel to know that if this order is used, the Court's striking out of the parenthesis does not indicate that the Court disagrees with that former interpretation of items of equipment requested, but the Court struck it out for fear that someone might contend that those two kinds of such requested equipment or services were the only kinds of information that could be obtained.

"(f) Finance charges, name of finance company, method of payment and amount of cash received, Provided that such inspection does not authorize microfilming of records". I am going to put a semicolon after the word "received" in line 18, instead of the period. Then there is another proviso, "Provided further that the production of the said rec-

ords or other documentary evidence shall not be required at any place other than the place where the said Ralph E. Malone usually keeps them." [42]

Is there any comment you wish to make, Mr. Frye, as to whether or not there is any reasonable basis of any contention that those specifications are not within the Court's ruling announced orally previously in this case?

Mr. Frye: I believe the records are not only within the general terms of the order, but they were drawn up particularly to avoid any further dispute in the matter.

The Court: Was the motion, in your opinion, reasonably construed, broad enough to cover these items, these specifications?

Mr. Frye: The motion was to enforce the subpoena, which used very broad words, your Honor, and that was what counsel objected to by telephone. He wanted the language to be specific. The language of the subpoena says, "records and invoices relative to all sales of new automobiles sold from December 19, 1950, to present date, including records of service performed on said automobiles." That was the order which your Honor enforced, with certain restrictions. As a convenience both to the Court and to the respondents, I have detailed exactly the records we need so as to put the matter beyond any further dispute.

The Court: Does that complete your statement?

Mr. Frye: Yes, your Honor.

The Court: I will hear any objections Mr. Graham may have. [43]

Mr. Graham: If the Court please, obviously in an order directing the inspection of documents, the respondent is entitled to a specification of the documents ordered to be produced. The Court will note from the affidavit of Mr. Bishop as to the various records maintained, and I would like to call the Court's attention to the provisions of CPR 83. The Court ordered that permission for inspection should go to those documents which are required to be maintained by the regulations.

The proposed order directs the inspection of "car invoices, customer invoices, customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery,". I call to the Court's attention that there is no requirement in the regulations for the maintenance of any records indicating cost of labor and materials expended in the preparation and conditioning of new cars for delivery. There is no such requirement.

There is a requirement in Sec. 10 of CPR 83 which I would like to submit for the Court's inspection. I have indicated the commencement of the section, your Honor. That information, as your Honor will note, is required to be maintained and placed upon customer invoices, and I think you will note that those appear to be what counsel has attempted [44] to enumerate in his elaborated form of order.

The Court: Item e under that Section 10 in this pamphlet CPR 83, Report 107, apparently of the

date of 11-12-51, reads: "Charge for other services or items of equipment requested (undercoating, glazing, etc.)."

Mr. Graham: May I continue for a moment, your Honor? You will note counsel in his order requests the inspection of customer invoices, car invoices, and frankly, we don't know what car invoices are. We have enumerated in the affidavit the specific records maintained by the company. The regulation directs the maintenance of customer invoices. He then concludes, "and any other records not specified above which contain the following information".

Now, your Honor, we are certainly entitled to an order which is not in the blanket terms of anything and everything that may contain information not specified in the foregoing. If the Court will examine the form of order which we have prepared, item 1 recites "all customer invoices covering new automobiles sold during the period specified." If the Court will compare that item 1 with the provision of the regulation to which I have just directed the Court's attention, the Court will see that in the documents designated and required to be kept by the regulation, namely, customer invoices, that information is required to be maintained, and any other designation of documents is not only not authorized [45] by the regulations, but is meaningless. For example, car invoices. We don't know what he is talking about, frankly. We are entitled to a specification. We are asked to turn over certain documents, and I believe it is incumbent upon the Court to designate so that we know with certainty and we run no risks of any

contempt proceedings or any other grounds for alleged noncompliance with the order.

The Court: Have you any objection as to (e) on the second sheet of petitioner's requested order form; that the words in parenthesis used originally be eliminated without prejudice to the petitioner's claim that that information as to those charges includes information as to undercoating, glazing, etc.?

Mr. Graham: No. It is my understanding, your Honor, that the regulation requires we maintain customer invoices on the sales of automobiles, and specified in the customer invoices shall be the information including that referred to in paragraph (e).

The Court: There is no danger of dispute on that item, then?

Mr. Graham: I think not, your Honor.

The Court: So far as undercoating and glazing are concerned.

Mr. Graham: I would like to call the Court's attention to the second item of my proposed order, with the [46] reservations I have previously indicated. I should say this, if the Court will read the original subpoena, administrative subpoena——

The Court: Duces tecum?

Mr. Graham: Yes.

The Court: It is attached to the first filing in this case?

Mr. Graham: Yes, it is at the bottom of the file.

The Court: It is attached to the first filing, namely, the motion for order requiring respondent to appear, testify and produce certain documents.

Mr. Graham: That is correct. The administrative subpoena attached thereto recites a request for records of new car sales and repair invoices. It is my contention, your Honor, and I think properly so, that there is no such requirement in the Act that any records of that character be maintained. The item 2 which I have placed in my order, I am satisfied we are not obligated to maintain by the Act. I maintain we are not called upon to produce those documents, but I recognize that the Court in its statement implied and directed that those documents be produced.

The Court: Item 1 in your order form is, according to your contention, a more accurate and correct description of the subject matter intended to be mentioned in what, if any, corresponding item in the order form requested by the [47] petitioner?

Mr. Graham: It covers everything from line 2 through line 18 of counsel's proposed order.

The Court: On the second page?

Mr. Graham: On the second page, yes, and the form in which I have proposed that, your Honor, is precisely the form called for by the regulation, and it is defined in the terms of the regulation in Section 10.

The Court: The printed copy of Report 107 which Mr. Graham handed to me includes a specification and specifications which are almost verbatim the same as those specifications stated in the petitioner's order form. Will you again call to the Court's attention in what particulars is there a divergence?

Mr. Graham: Let me read the order of the plaintiff. The plaintiff says that the inspection shall include customer invoices.

The Court: Where is that?

Mr. Graham: Line 2, page 2 of the plaintiff's order.

The Court: Customer invoices, and your order says "all customer invoices covering new automobiles". Do you feel that the words "customer invoices" might be contended later by the plaintiff to apply to automobiles other than new? [48]

Mr. Graham: They asked in the administrative subpoena, your Honor, for invoices relating to the sales of new automobiles, and that was what the Court ordered that there be produced. The thing that I object to most particularly is a catch-all or bucket phrase that we are to produce customer invoices, car invoices—which I state we don't know what he means—customer purchase orders, conditional sales contracts, repair orders, records which indicate cost of labor and materials, etc., and any other records not specified above which contain the following information. I maintain, and I think properly, that the Court cannot direct the production of a catch-all phrase, "and any other records not specified above which contain the following information". The regulations require that customer invoices contain that information, and that is the only document we are required to maintain by the regulations.

The Court: I would like to hear from petitioner's counsel as to what construction he puts on that additional phrase, "car invoices".

Mr. Frye: Your Honor, I don't like to embarrass counsel, but in Exhibit B to Mr. Bishop's affidavit, he submits a document called car invoice, and that is the current record which he now uses, and knowing their spirit of uncooperativeness, I did not want to designate a form by other than its exact title. [49]

Mr. Graham: May I clarify that? That is the present form of customer invoice presently in use by the respondent?

Mr. Knudsen: It is delineated in the body of the affidavit as a customer invoice.

The Court: What date was that filed?

Mr. Frye: It was filed last Friday, I believe.

The Court: Is it a four page affidavit, signed by Mr. Bishop under date of April 10 before Mr. Knudsen?

Mr. Graham: It is a document with several pages attached.

The Court: Then there is a different one signed by Mr. Bishop under date of April 10 with a great many of these forms.

Mr. Graham: That is correct.

The Court: You say there is something among those forms called a car invoice?

Mr. Frye: On Exhibit B. If he doesn't know what that is, it is the present, current record that is now in use. Prior to that time, your Honor, there was another document in use which is called a sales invoice, or just plain invoice. That document was in use under the old freeze order and the supplemental regulations thereto, and this most recent car invoice is what is required by Ceiling Price Regu-

lation 83 which has been in effect only since October, [50] so in order to make a complete examination and leave no doubt as to what records are required for that purpose, I have specified, using the names right on the exhibits furnished by the respondent, plus the specific requirements after October 15 which are contained in the regulation.

The Court: Is there anything else that Mr. Graham wishes to say?

Mr. Graham: Only this, your Honor: In addition to the substance of the regulation, which I think our proposed form nails down and spells out in terms of the regulation, I have provided in our proposed order a time of inspection. I think we are entitled to a delineation of a reasonable period of time.

The Court: In the petitioner's form of order, where is that subject dealt with? Lines 21-23?

Mr. Frye: We haven't specified a time, your Honor. There is no time specified in the plaintiff's order. They have had about three weeks to think about it, so I assume it will be forthwith.

The Court: I believe you meant during the day, and how long in the future they have to work?

Mr. Graham: That is correct, and when it may be the order that the inspection commence.

The Court: Notice near the bottom of page 1 of respondent's requested order. [51]

Mr. Graham: That is the last paragraph.

The Court: Do you in the fore part of the order say anything about the period of time from now until some date in the future when you would like

to exercise this privilege which you seek to obtain by the order?

Mr. Frye: No, your Honor, for two reasons: I don't know how long it will take cost accountants to go through all those records for nearly a year and a half; and furthermore, the regulations require in a blanket sort of way that they be kept and preserved now and for a period of two years hence, so I think any watering down of the power given to the agency in the regulation is not proper, especially to a period of one week. They have refused to comply with the requirements of the regulation which require that certain records be kept for inspection. It does not say to keep them for inspection for one week or ten days or anything of that sort, so I think the right to inspect them during reasonable business hours, etc., is proper, but without specific limitation, your Honor.

The Court: I prefer to state the privilege to be granted by this order in the affirmative rather than in the negative. You seem to have suggested it in the negative, Mr. Frye, and I would like to make appropriate changes in the language in lines 21-23 inclusive on the second page of plaintiff's order. "Shall be required at 3922"—is [52] that the correct address?

Mr. Frye: 3922 West Alaska Street, yes, your Honor.

The Court: Mr. Graham, do you believe that to be the correct address?

Mr. Graham: Yes, your Honor.

The Court: During the reasonable business hours of respondent. What else need be said?

Mr. Graham: Your Honor, I would like to have the effective date specified in order that I may have time to perfect an appeal to the Ninth Circuit Court.

The Court: Until the further order of this Court. What date does the plaintiff feel that it is imperative that this work begin?

Mr. Frye: I would agree to April 23, your Honor, beginning April 23 as counsel has suggested in his order.

The Court: Will counsel as to the plaintiff's requested form strike out the word "not" in line 22, following the word "shall" leave in effect the words "be required at", strike out the remaining words in that line, and strike out all of the words in line 23. After the word "shall", which is the last word left in line 22, insert these words, "the premises of respondent at 3922 West Alaska Street, Seattle, during the reasonable business hours of respondent". If there was sufficient space, I would wish to say, "commencing on April 23, 1952 and continuing until the further order of [53] this Court." I think it would be better to state a definite period. How long do you anticipate now, Mr. Frye, considering the facts stated in the affidavits and what you think would appear to be reasonable from the record now made, would be reasonably required to make this inspection?

Mr. Frye: Your Honor, it is difficult to state a definite period. As I tried to point out, the regulation requires that the records be kept and pre-

served for inspection even for a period going two years beyond the effective date of the regulation.

The Court: But so far as making this inspection by virtue of this order, not by virtue of a standing regulation, what is the limit of time which you think would be reasonable? Do you think one month would be reasonable?

Mr. Frye: I think one month might be rather short, your Honor.

The Court: Do you think until June 1 would be reasonable?

Mr. Frye: May we come back in and ask for an extension?

The Court: There is nothing in the order that says you cannot, and there is nothing in the order that says the respondent and petitioner may not come back next week and ask for a change in the order. I cannot prevent you from applying to the Court, nor am I disposed to so indicate the desire to do that. [54]

Mr. Frye: Until June 1, then, your Honor, I would agree to at this time, subject to further order of the Court.

The Court: Mr. Graham spoke of intending to seek a review by an appellate court of this order. Does that possibility have any bearing on the reasonableness of the time which the Court should now express?

Mr. Frye: I don't believe it does.

The Court: It is possible that the suggested initial period of time during which this order is to remain effective might expire during the pendency of the review before the appellate court.

Mr. Frye: That is correct. If we have a month and no interference, we will get the job done.

The Court: I ask counsel to insert in this order, after the word "respondent" which I have previously inserted in line 23, these words "commencing on April 23, 1952 and continuing until June 1, 1952".

The Court will not award any costs now. I will mark that out. The Court may in the future make some ruling on that subject, but I do not wish to do so now.

Let this order entitled order enforcing administrative subpoena, which was originally typewritten in the office of counsel for petitioner, but which order has been changed in certain respects by the Court's handwritten interlineation or striking by handwriting, be now entered. The Court [55] respectfully declines to use the order form suggested by counsel for respondent, because I think it is better to specify, as far as we know now, the specific material which the order is expected to reach.

Mr. Graham: If the Court please, may I ask that the Court determine a supersedeas bond and cost bond in the sum of $250, and I would like to file the notice.

The Court: What information if any does the attorney for the respondent have upon that subject which he would like the Court to consider? I would like to know first if Mr. Graham for the respondent has anything further to state on that subject.

Mr. Graham: I would like to say this, your Honor, that the rules provide that upon the filing

of a notice of appeal, a cost and supersedeas bond may be approved. The customary cost bond is in the sum of $250, and the supersedeas bond here—there is no judgment, if the order of the Court is sustained or is not sustained, there is no monetary damage so far as the petitioner is concerned, and it would appear that the statutory provision for the $250 bond, which, as I understand, is customary on administrative orders, would be in order, and I would like to have the Court indicate an amount in order that that may be presented for filing.

The Court: Do you wish me to understand that you suggest the posting in this case of two bonds, one a cost [56] bond and the other supersedeas?

Mr. Graham: They can be united in one bond, your Honor.

The Court: You suggest that a $250 cost bond is appropriate, and what do you suggest as an additional amount to operate as a supersedeas bond?

Mr. Graham: Obviously, no monetary measure can be imposed upon the administrative order involved here, so it simply should be a nominal amount, your Honor. $250, a total bond of $500, would certainly seem to me to be in order.

The Court: What information would plaintiff's counsel like the Court to consider?

Mr. Frye: Your Honor, if counsel means to have the supersedeas bond stay this order——

The Court: That is what he intends, as I understood him. As a matter of fact, I would suppose that is the primary purpose of the appeal.

Mr. Frye: Yes, your Honor. In that event, as

each day goes by the Government may lose part of its damage action. There is a statute of limitations of one year on this, and I think the bond should be greater in this case for that reason, your Honor.

The Court: How much would you estimate that damages for wrongful delay in furnishing this material might be?

Mr. Frye: It might well run to four or five thousand [57] dollars in a treble damages action. We can't compute it, of course, until we can get at the records. We can only estimate, your Honor.

The Court: What do you think of the fairness of the Court fixing some bond not less than the amount of what you feel now might be the accrued damages accruing during appeal which might operate to permit the defendant to wrongfully delay? What do you think of the feasibility and fairness of the Court fixing a bond today in what might be termed a minimum sum, with the privilege of counsel on both sides to later on show to the appellate court or, if it is appropriate, show to this Court that an additional supersedeas bond is required by the circumstances?

Mr. Frye: I would prefer to have more time to give it consideration, your Honor, subject to coming back.

The Court: The Court is considering advising the respondent that in case of appeal or undertaking to perfect review proceedings a supersedeas bond of $4,000 be posted initially.

Mr. Graham: If the Court please, in view of the fact that it is necessary for me to leave the city

this afternoon, may I ask that there be fixed a time when I might present an order? It is an ex parte order, but I would like to have counsel advised in open court that I may present it.

The Court: Today? [58]

Mr. Graham: I would be prepared at 1:30.

The Court: Is that agreeable? Could you be here at 1:30?

Mr. Frye: I will be here at 1:30. I did not understand——

The Court: The Court now informally advises counsel in this case that if the respondent files some notice or other appropriate paper relating to initial steps of appeal——

Mr. Graham: The appeal has now been perfected. The notice of appeal has been filed with the clerk.

The Court: This notice having been effected, the Court advises counsel on both sides that the Court will require a $4,000 supersedeas and cost bond, a bond to operate both as a supersedeas and cost bond in the total sum of $4,000.

Mr. Graham: Yes, your Honor. I will hope to be able to have it prepared by 1:30. If not, I will advise the clerk to that effect and one of the other gentlemen in the office may handle the presentation, if that is agreeable to the Court.

The Court: Would it be just as well to have it at 2 o'clock?

Mr. Graham: Whatever the Court's convenience.

The Court: If 1:30 will accommodate you personally [59] in your program of having to leave the city——

Mr. Graham: I am not leaving until later, so 2 o'clock will be agreeable.

The Court: Two o'clock will be the hour instead of 1:30. I ask counsel on both sides to be present.

(Further proceedings at 2:00 p.m., April 16, 1952.)

Mr. Graham: I found in the period of time at my disposal and the necessity of arranging for collateral on this supersedeas bond, that it has been impossible to do so. The hearing at Richland which had been scheduled for the balance of the week has been cancelled by the Labor Board as of 11:30 this morning, so it would be possible for me to be back in court either tomorrow or Friday. I would ask leave to submit that bond for approval by the Court at some convenient time, and if I might advise the clerk when we have been able to complete financial arrangements——

The Court: Ten o'clock tomorrow morning or ten o'clock Monday morning.

Mr. Graham: Probably 10 o'clock tomorrow. Monday will be convenient, if it is agreeable with the Court.

The Court: The Court will make no appointment. It is not of such nature that the Court will make any order, except that the record will show what you have now said. The Court will make no order.

Mr. Frye: It would be more convenient for me Monday afternoon.

The Court: I cannot attend to it Monday afternoon.

(Further proceedings on April 21, 1952.)

The Court: Mr. Graham, will you come forward if you have an ex parte matter respecting this Westside Ford matter?

Mr. Graham: Under the terms of the statute, your Honor—as a matter of fact, there is no provision for furnishing notice, but I have furnished counsel with a copy of the cost and supersedeas bond, which is drafted in accordance with the provisions of rule 73(d). I have that here for the Court's inspection.

The Court: Did you orally advise counsel when you were going to present the matter.

Mr. Graham: Yes. Counsel is here in court, your Honor.

The Court: I will hear any objections, if there are any.

Mr. Holbrook: May it please the Court, the Government objects to the form as offered by the defendant of the supersedeas bond in this matter. The problem arising in this bond——[61]

The Court: If you are not agreed on it, I will have to let the matter go to the end of the calendar.

The Court: If counsel in the Westside Ford matter will come forward, I believe we can dispose of it. I wish you in further discussion to have in mind that any supersedeas bond can be changed during the pendency of the appeal, either by the Appellate Court, or, possibly, I do not know, I have not looked at the law as to whether this Court can, but if counsel desire to try to convince the Court that the bond should be greater or less at some time pending appeal, the Court could, I think, rule in accordance

with the Court's judgment in the matter after hearing counsel. Do you have that in mind in presenting your objections now?

Mr. Holbrook: Yes, your Honor. I understand at the present time that the Government's approval is not necessary to the bond. A stipulation for the approval of the bond as submited to the Court for the Court's approval does not end the further relief granted to the Government regarding the supersedeas appeal bond that we have here.

The objection at the present time directed to the bond is directed to the language of the rule that provides for the bond, and it is admitted that the language of the bond follows generally the language of the rule. The Court [62] considered it at the time of the setting of the amount of the bond, the unusual problem that is confronted by the Government in this instance, so therefore it is considered not necessary to call to the Court's attention that the general language of the rule, in my opinion, does not fit the specific problems that can arise in the instant case.

I also call to the Court's attention the necessity for a correction of punctuation in line 2 on the second page of the bond itself. "Now, therefore, if the terms of said order shall be satisfied and complied with together with costs," and the bond reads "interest and damages for delay". I suggest that following the language of the rule, that interest should be followed by a comma, and then the wording, "and damages for delay".

Mr. Graham: I want to check the rule. The rule does carry the comma after the word interest, and it

would be appropriate that a comma be inserted after the word interest.

The Court: You may do that. Counsel will have in mind what the Court previously said, that if either side during this appeal feels that this bond is either inadequate or excessive, some court will hear you in respect to that matter.

Mr. Holbrook: Yes, your Honor, I understand that, and with that thought in mind for the record at this time [63] the grounds for the objection of the Government have been stated.

The Court: Let this cost bond and supersedeas bond on appeal be now filed in this case, it having been already approved by this Court, and together therewith let the certified copy of the power of attorney of the attorney in fact executing the bond on behalf of the surety be filed.

[Endorsed]: Filed May 15, 1952.

[Endorsed]: No. 13392. United States Court of Appeals for the Ninth Circuit. Westside Ford, Inc., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 22, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals
for the Ninth Circuit

No. 13392

WESTSIDE FORD, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPLICATION FOR APPROVAL OF STIPULATION

Comes now Westside Ford, Inc., Appellant in the above-entitled cause and requests that this Honorable Court approve the stipulation in this cause attached hereto and made a part hereof as fully as if set forth herein.

BOGLE, BOGLE & GATES,
/s/ By ROBERT W. GRAHAM,
Attorneys for Appellant.

The above application for approval of the attached stipulation is hereby granted.

Done in Open Court this sixteenth day of May, 1952.

/s/ WILLIAM DENMAN,
Circuit Judge,
/s/ WILLIAM HEALY,
/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals
for the Ninth Circuit.

STIPULATION CONCERNING TRANSMITTAL OF EXHIBITS ON APPEAL

It Is Hereby Stipulated and Agreed by and between the parties to the above-entitled cause, by their respective attorneys, as follows:

That, subject to the approval of the United States Court of Appeals for the Ninth Circuit, Exhibits A, B, C, D, E, F, G, H, I, J and K attached to and incorporated as a part of an affidavit of William L. Bishop dated April 10, 1952 and to be designated as part of the record on the appeal of the above-entitled cause shall be presented to said Court for consideration in said appeal in their original form and without being printed in the record on appeal.

Dated at Seattle, Washington, this fifteenth day of May, 1952.

/s/ BOGLE, BOGLE & GATES

/s/ By ROBERT W. GRAHAM,
Attorneys for Appellant.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FREDERIC P. HOLBROOK,
Special Assistant United States Attorney,

/s/ HOWARD F. FRYE,
Trial Attorney,
Attorneys for Appellee.

[Endorsed]: Filed May 26, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Comes now Westside Ford, Inc., Appellant in the above-entitled cause, and states that on its appeal herein it will rely upon the following points:

The District Court erred in overruling Appellant's objections and answer to motion for order requiring respondent to appear, testify and produce certain documents and in entering the order enforcing administrative subpena, of April 16, 1952, because:

(A) The administrative subpena duces tecum issued March 25, 1952, was invalid when issued because the Seattle District Enforcement Director of the Office of Price Stabilization did not define the scope and purpose of the investigation, inspection or inquiry to be made before issuing said subpena, as is required by:

(1) Section 705(a) of the Defense Production Act of 1950, as amended:

(2) Enforcement Procedure Regulation 2 of the Office of Price Stabilization;

(3) Delegation of Authority 4, Supplement 1, as revised, of the Office of Price Stabilization.

(B) The administrative subpena duces tecum issued March 25, 1952, was invalid when issued because the Seattle District Enforcement Director of the Office of Price Stabilization did not define the scope and purpose of the investigation, inspection or inquiry to be made to Appellant at or before the

time of service of said subpena, nor was Appellant advised of or served with any such definition of scope and purpose at or prior to service of said subpena, all as is required by:

(1) Section 705(a) of the Defense Production Act of 1950, as amended;

(2) Enforcement Procedure Regulation 2 of the Office of Price Stabilization;

(3) Delegation of Authority 4, Supplement 4, as revised, of the Office of Price Stabilization.

(C) The administrative subpena duces tecum issued March 25, 1952, was invalid when issued because Appellee did not serve upon Appellant an Inspection Authorization prior to the issuance of said subpena in accordance with Enforcement Procedure Regulation 1 of the Office of Price Stabilization and in accordance with Section 705(a) of the Defense Production Act as amended.

(D) The District Court order enforcing administrative subpena of April 16, 1952, authorizes the inspection of documents completely immaterial and irrelevant to any possible proper investigation, inspection or inquiry to be made.

(E) The administrative subpena duces tecum issued March 25, 1952, was invalid when issued because it was so vague in its requirements that it amounted to an attempted unreasonable search and seizure within the prohibition of the Fourth Amendment and lack of due process under the Fifth Amendment to the Constitution of the United States.

(F) The administrative subpena duces tecum is-

sued March 25, 1952, was invalid when issued because it was so vague and uncertain in its requirements as to be incapable of enforcement at law.

(G) The District Court order enforcing administrative subpena, of April 16, 1952, is so vague and uncertain in its requirements that it authorizes an unreasonable search and seizure within the prohibition of the Fourth Amendment and lack of due process within the prohibition of the Fifth Amendment to the Constitution of the United States.

(H) The District Court order enforcing administrative subpena, of April 16, 1952, fails to designate the documents of which inspection is authorized with that degree of reasonable certainty required by law.

(I) The District Court order enforcing administrative subpena, of April 16, 1952, denies Appellant the due process of law required by the Fifth Amendment to the Constitution of the United States by authorizing on-premises inspection of documents after Appellant was required to defend a motion for off-premises production of documents.

(J) The terms of the District Court order enforcing administrative subpena, of April 16, 1952, exceeded the scope of the pleadings, prayer and evidence before the District Court.

(K) That part of the District Court order enforcing administrative subpena, of April 16, 1952, which authorizes Appellee to photograph Appellant's records is not authorized by the Defense Production Act of 1950, as amended, or any other law.

(L)) The District Court order enforcing administrative subpena, of April 16, 1952, authorizes the

undue, unreasonable and unlawful harassment of Appellant by Appellee.

(M) The cumulative effect of the administrative improprieties stated above is such that the District Court committed reversible error in granting its order enforcing administrative subpena, of April 16, 1952.

/s/ BOGLE, BOGLE & GATES and
/s/ ROBERT W. GRAHAM,
/s/ J. KENNETH BRODY,
/s/ C. CALVERT KNUDSEN,
Attorneys for Appellant.

[Endorsed]: Filed June 5, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF MATERIAL PORTIONS OF RECORD TO BE PRINTED

Comes now Westside Ford, Inc., Appellant in the above entitled cause, and hereby designates the following portions of the record on appeal which are material to the consideration of this appeal and requests that the same be printed:

(1) Motion for Order Requiring Respondent to Appear, Testify and Produce Certain Documents, together with Exhibit A attached to and a part of said Motion.

(2) Affidavit of Harold F. Nelson, dated April 3, 1952.

(3) Affidavit of Philip E. Hartwick, dated April 3, 1952.

(4) Affidavit of John H. Binns, dated April 3, 1952.

(5) Affidavit of John P. Colman, dated April 3, 1952.

(6) Objections and Answer to Motion for Order Requiring Respondent to Appear, Testify, and Produce Certain Documents.

(7) Affidavit of William L. Bishop (6 pages), dated April 10, 1952, but omitting Exhibits A, B, C, D, E, F, G, H, I, J and K thereto.

(8) Second Affidavit of William L. Bishop (4 pages), dated April 10, 1952.

(9) Affidavit of Ralph E. Malone, dated April 10, 1952.

(10) Affidavit of Robert W. Graham, dated April 10, 1952.

(11) Affidavit of C. Calvert Knudsen, dated April 10, 1952.

(12) Affidavit of John H. Binns, dated April 14, 1952, together with Exhibit 1 attached to and a part of said Affidavit.

(13) Affidavit of William L. Bishop, dated April 14, 1952.

(14) Following portions of the Transcript of Proceedings on Hearing on Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and Produce Certain Documents:

(a) Lines 1 through 7, page 2; (b) lines 7 through 14, page 4; (c) line 2, page 6, through line 15, page 8; (d) line 25, page 9, through line 4, page 10; (e)

line 23, page 25, through line 24, page 28; (f) line 11, page 30, through line 5, page 31; (g) line 17, page 36, through line 9, page 37; (h) lines 13 through 17, page 39.

(15) Order Enforcing Administrative Subpena, dated April 16, 1952.

(16) Notice of Appeal by Respondent Westside Ford, Inc., dated April 16, 1952.

(17) Cost Bond on Appeal and Supersedeas Bond, dated April 21, 1952.

(18) Statement of Points on Which Appellant Intends to Rely, filed herewith.

/s/ BOGLE, BOGLE & GATES and
/s/ ROBT. W. GRAHAM,
/s/ J. KENNETH BRODY,
/s C. CALVERT KNUDSEN,
Attorneys for Appellant

[Endorsed]: Filed June 5, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause]

DESIGNATION OF ADDITIONAL MATERIAL PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the United States of America, Plaintiff-Appellee, hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit the following portions of the record, proceedings and evidence in this

action in addition to that portion designated by the Defendant-Appellant and requests that the same be printed:

(1) The complete and entire stenographically reported transcript of the evidence and proceedings on Hearing on Petitioner's Motion for an Order Requiring Respondent to Appear, Testify and Produce Certain Documents.

(2) Designation of the Portions of Record to be Printed filed by Defendant-Appellant, Westside Ford, Inc.

(3) This designation.

Dated this eleventh day of June, 1952.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ FREDERIC P. HOLBROOK,
Special Assistant U. S. Attorney,

/s/ HOWARD F. FRYE,
Trial Attorney,
Office of Price Stabilization.

[Endorsed]: Filed June 13, 1952. Paul P. O'Brien, Clerk.